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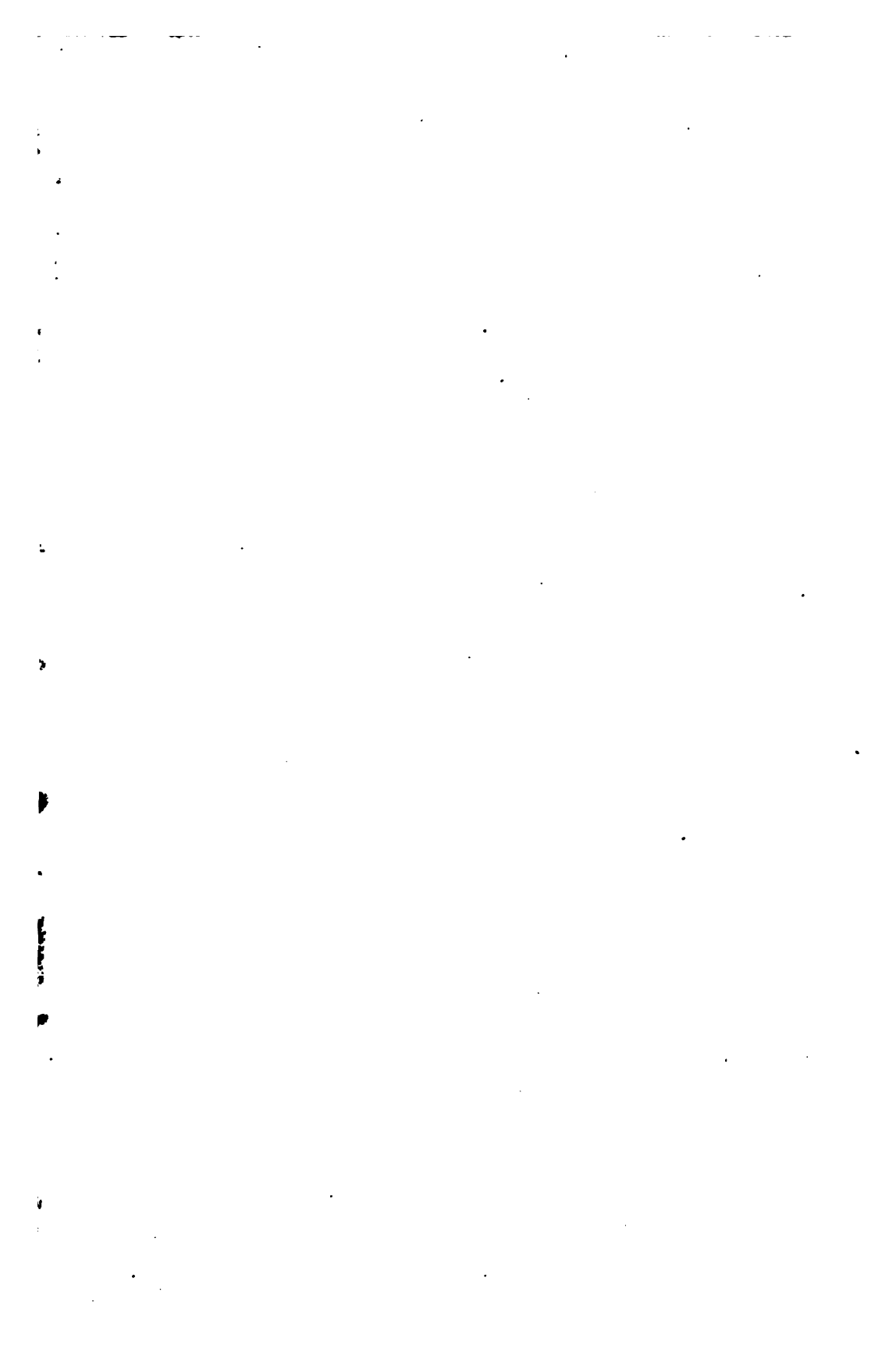
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ERRATA.

- Page 24, 1st syllabus, line 1, for shop read shock.
Page 187, 3d syllabus, line 2, for 1895 read 1905.
Page 188, last line, for 1895 read 1905.

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 7381. Decided July 7, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE K.
GILLULY, *Appellant*.¹

WITNESSES—CREDIBILITY—EVIDENCE OF ANIMOSITY. In a prosecution for forgery of an order for witness fees, it is proper to exclude cross-examination of state's witness to show her animosity to the accused by evidence that she was a friend of a party unsuccessfully defended by the accused.

APPEAL—REVIEW—HARMLESS ERROR. It is not error to exclude the answer to a question that has already been answered.

CRIMINAL LAW—VENUE—EVIDENCE. The venue of a forgery is sufficiently established, although no witness testified directly that the crime was committed at a designated place, where there were many inferences from the testimony and a great deal of direct proof that it was committed in a certain county.

CRIMINAL LAW—APPEAL—REVIEW—VERDICT. A verdict in a criminal case cannot be set aside because of the vague, inconsistent and contradictory statements of the principal witness for the state, where there was sufficient evidence, if uncontradicted or if believed by the jury, to sustain it.

CRIMINAL LAW—SENTENCE—CHANGE OF LAW. Where the crime of forgery was committed on April 11, 1907, the accused cannot be sentenced under the law approved March 13, 1907, p. 341, which went into effect June 11, 1907; since § 8 provides that a person found guilty of a crime committed prior to the taking effect of the law shall be sentenced under the law in force at the time of the offense.

SAME—APPEAL—DECISION—SENTENCE—REMAND. Upon reversing a criminal conviction because of an improper sentence, the case will be remanded for the imposition of a proper one.

¹Reported in 96 Pac. 512.

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SAME—APPEAL—DECISION—SENTENCE—REMAND. Upon reversing a criminal conviction because of an improper sentence, the case will be remanded for the imposition of a proper one.

¹Reported in 96 Pac. 512.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered September 23, 1907, upon a trial and conviction of the crime of forgery. Reversed.

Harris Baldwin, for appellant.

R. M. Barnhart, George A. Lee, and J. Stanley Webster, for respondent.

DUNBAR, J.—The defendant was convicted of the crime of forgery. The information charged that he unlawfully, feloniously, etc., forged and counterfeited a certain instrument, set forth as follows:

“April 11th, 1907.

“To the Auditor of Spokane County, Washington: Please give to George K. Gilluly fees due me in the case of State v. Theo. Barlough.
Florence Gray.”

To this information the defendant pleaded not guilty, and upon a verdict of guilty by the jury, was sentenced to the penitentiary under the indeterminate sentence law. The defendant presented this order to the auditor, and obtained the fees due Florence Gray to the amount of \$2.20. His contention was that he was authorized by Florence Gray to write this order and sign her name to it.

The appellant assigns as error, (1) that the court erred in sustaining the objections of the respondent to testimony which the appellant sought to elicit from the witness Florence Gray on her cross-examination, which would, if admitted, have tended to show animus by her against the appellant; (2) the court erred in sustaining the objections of the respondent to testimony which the appellant sought to elicit from the witness Sadie E. Simpson, which would have, if admitted, tended to show that Florence Gray did authorize the appellant to receive from the county auditor the witness fee specified in the information; (3) that there was no evidence that the crime alleged was committed in Spokane county, and no proof of jurisdiction; (4) that the verdict is against the

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evidence; (5) that the court erred in denying appellant's motion for a new trial; (6) that the judgment of the court was under a statute which is *ex post facto* as to appellant.

The first assignment is so vague and indefinite that it is with the utmost difficulty that the court can determine what particular testimony is referred to; but we gather that the testimony which was excluded, and upon the exclusion of which error was based, was an attempt to show on cross-examination that the witness Florence Gray was on intimate terms of friendship with one Mr. Barlough, the appellant having defended Barlough for the crime of rape, and this being the case in which the witness fee which is the subject of the information in this case was earned by the prosecuting witness Florence Gray, and the contention of the appellant being that, inasmuch as the appellant failed to successfully defend the said Barlough, said Barlough being a particular friend of the witness Florence Gray, she would be prejudiced against the appellant who acted as an attorney in the defense of Barlough. The court said in passing upon that question: "I don't see how the relationship of friendship with Mr. Barlough would have any bearing upon this case unless you show some reason for it. There is no sufficient reason shown here to justify the presumption of animosity." We think the court was justified in excluding all such testimony as this. Its introduction would have no effect but to cloud the real issues in the case.

As to the second assignment, that the court erred when it excluded the testimony of Sadie E. Simpson, which would have tended to show that Florence Gray authorized the appellant to collect the witness fee of \$2.20 referred to in the information, it is stated in the appellant's brief that the court excluded this testimony upon the theory that no foundation had been laid to impeach the testimony of Florence Gray by the testimony of Sadie E. Simpson; but an examination of the record shows that this contention is with-

out foundation. It must be conceded that the foundation was fully laid, but the witness did testify that on one occasion she heard the witness Mrs. Gray conversing over the telephone with the appellant, and that she did ask him to collect her witness fees for her in the Barlough case, and after a good deal of questioning backwards and forwards the court stated that the witness could answer as to any instance in addition to those she had already referred to. But again, immediately after this, in response to the question: "Did you ever or not hear Mrs. Gray request Mr. Gilluly, over the telephone or otherwise, to collect her witness fees for her?" she answered: "No, only that time;" and the court stated that that answered the question. When it was asked again, in practically the same form, the court did not rule it out on the ground that no proper foundation had been laid, but on the ground that it was substantially the same question that had been asked before. This assignment also is obscure and indefinite, and the court has met with the same difficulty in determining just what testimony is referred to as a basis for the assignment of error.

The third assignment is without merit. It is not necessary in order to sufficiently prove venue that some witness testify directly that the crime was committed in a designated place. It is enough that evidence incidentally given on the trial of the cause shows that the venue was properly laid. *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810. In this case the evidence was overwhelming and beyond dispute or doubt that the crime, if committed at all, was committed in Spokane county. The order itself on which the information was based is an order to the auditor of Spokane county. The prosecuting witness testifies that she was a witness in a case tried in the superior court of Spokane county, and that the order for the witness fee was written on Gilluly's professional card. The appellant himself testified that he was a practicing attorney in Spokane, and that Mrs. Gray was a witness in the

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superior court of Spokane county in a case in which he was counsel. He testified that he had a law office in Spokane, and that it was in his office that she authorized him to get her witness fees for her, and that he signed the order which was the cause of the trouble. The officer testified as to his official capacity in Spokane county, and to his having delivered the witness fees to the appellant in his office. There are not only many inferences in this testimony tending to show that the forgery was committed in Spokane county, but there is a great deal of direct proof to the same effect.

The next contention is that the verdict was against the evidence. It is alleged that the evidence did not come up to that degree of convincing force which is necessary to a conviction of crime; that the evidence of Florence Gray, which was the principal testimony in the case, was suspicious in its nature and method of expression, inconsistent and contradictory. In consideration of the character of the prosecuting witness as evidenced by her own testimony and admissions, we are impressed with the idea that the proof against the appellant was not very conclusive, and that the jury would have been warranted in finding the appellant not guilty. But there was sufficient evidence, if not contradicted or if believed by the jury, to sustain the verdict, and the jury being the tribunal upon which the law imposes the duty of weighing the testimony, it is not the province of this court to disturb the verdict.

The assignment in relation to the error of the court in denying appellant's motion for a new trial falls within the same reason.

The sixth assignment, viz., that the judgment against the appellant is under the statute which was *ex post facto* as to him is meritorious. He was sentenced under a statute which was approved by the governor on March 13, 1907, and took effect on June 11, 1907, and the crime of which he was convicted was committed on April 11, 1907. We think it can-

not be questioned that the sentence should have been imposed under the law which was in force and effect at the time the crime was committed. Section 8 of what is termed the "indeterminate sentence act," ch. 155, Laws of 1907, p. 341, contains the following provision:

"Persons convicted of a felony committed prior to the taking effect of this act, and sentenced after this act is in force, shall be sentenced under the law in force at the time such felony was committed."

The statute seems to be too plain to admit of controversy. But in reversing the judgment of the court for this error it does not follow that the court has lost jurisdiction to pronounce a proper and legal judgment.

"Where there is no reversible error except that, in sentencing, the court has exceeded its power or imposed a sentence which is vague and indefinite, the appellate court on a reversal will not order a new trial, but will remand the case to the trial court for the imposition of a proper judgment and sentence." 12 Cyc. 942, and cases cited.

In discussing the case of *In re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149, Judge Field, in speaking for the supreme court of the United States, said:

"But in such cases there need not be any failure of justice; for, where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected. The judges of all courts of record are magistrates, and their object should not be to turn loose upon society persons who have been justly convicted of criminal offenses, but, where the punishment imposed, in the mode, extent, or place of its execution, has exceeded the law, to have it corrected by calling the attention of the court to such excess. We do not perceive any departure from principle or any denial of the petitioner's right in adopting such a course. He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he

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would obtain if opportunity be given to that court for correction in that particular."

In that case the application was a petition for a writ of habeas corpus where the prisoner had been sentenced to a penitentiary to which the law did not allow the court to send him. Judge Field further quoted from *Beale v. Commonwealth*, 25 Pa. St. 11, where the court said:

"The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine, that a prisoner whose guilt is established by a regular verdict is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established."

This seems to be the overwhelming weight of authority, and it is a rule to which this court is inclined to yield its allegiance.

The judgment of the court will therefore be reversed, and the cause remanded with instructions to the lower court to pronounce sentence according to law.

ROOT, CROW, FULLERTON, and RUDKIN, JJ., concur.

[No. 7208. Decided July 9, 1908.]

J. S. KANE *et al.*, *Appellants*, v. THOMAS G. BORTHWICK,
Respondent.¹

SET-OFF AND COUNTERCLAIM—QUIETING TITLE—JUDGMENT. In an action to quiet title by the cancellation of a contract of sale, upon which a first payment had been made, the defendant is not entitled to set up a counterclaim for the money paid, and a personal money judgment therefor is error, although repayment might have been adjudged a condition precedent to the equitable relief sought.

VENDOR AND PURCHASER—REMEDIES OF VENDOR—TENDER—WAIVER—QUIETING TITLE—CANCELLATION OF INSTRUMENTS. A tender of a deed is not a condition precedent to an action by vendors for the cancellation of a contract of sale as a cloud on title, where the vendees refused to accept the title, and the vendors were able and willing to perform the contract.

VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—TITLE OF VENDOR—OBJECTIONS. It is not a valid objection to title, placing the vendor in default, that the given name "Hannah" in the chain of title was spelled with one "n" in one deed and with two in the other deed, and that as grantee her residence was given as P. county, Washington Territory, in 1870, and as grantor, B. county, Oregon, in 1880.

SAME. It is not a valid objection to a title that the husband of the grantor who executed the deed was not named as one of the grantors, where he was named in the body of the warranty clause and covenanted that the wife was seized in fee simple.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 9, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

Kerr & McCord and *C. M. Miller*, for appellants.

S. H. Steele, for respondent.

RUDKIN, J.—On the 31st day of December, 1906, the plaintiff J. S. Kane and the defendant, Borthwick, entered

¹Reported in 96 Pac. 516.

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into the following contract for the sale of the real property therein described:

"Received of Thomas G. Borthwick two hundred dollars as earnest money on the purchase of the west half of lot 8, block 18, Law's Addition to Seattle, W. T. Total purchase price to be \$6,200, balance of \$6,000 payable on delivery of deed. I am to furnish abstract brought down to date and Mr. Borthwick to have five days in which to examine same after delivery to him or his attorney. Title to be free and clear of all incumbrances, including street assessments. In case the title is a good and marketable title and the purchaser fails to complete the purchase by paying the balance due, the \$200 this day paid is to be retained by me as liquidated damages. In case the title is not good and can not be made good within thirty days, I am to return the \$200. One insurance policy now on the property amounting to \$1,000 is to be turned over to the purchaser and he is to pay \$19.35 for the policy of \$2,000 now on the property. Laundry trays now in basement to be connected and ready for use and all electric fixtures now in the house to remain there."

Soon after the execution of this contract, an abstract was prepared and delivered to the purchaser for examination. The opinion of the attorney who first examined the abstract for the purchaser is not before us, but it seems that the only defects discovered by him were a mortgage, a street assessment, and a materialman's lien against the property. The purchaser for some reason became dissatisfied with the report of this attorney and employed other counsel. The opinion of the latter is in the record and points out eleven specific objections to the title. Two of these objections were based on the following facts: The property was conveyed to Hanah R. Mason of Pierce county, W. T., by deed dated October 4, 1870, and was conveyed by Hannah R. Mason of Benton county, Oregon, by deed dated May 21st, 1880. The latter deed was also signed by P. W. Mason, who acknowledged the same before a justice of the peace as the husband of Hannah R. Mason. The name of the husband did not

appear in the granting clause of the deed, but the deed itself contained the following covenant:

"Said Hannah R. Mason and P. W. Mason covenant to and with said C. H. Spinning [the grantee] his heirs and assigns, that she is the owner in fee simple of said premises; that they are free from all encumbrances, and that she will warrant and defend the same from all lawful claims."

The objections raised and pointed out in the opinion of the examiner were:

"(1) Instrument No. 6 is a conveyance to *Hannah R. Mason of Pierce Co., W. T.*, while instrument No. 7 is a conveyance by *Hannah R. Mason of Benton County, Oregon*. There should be proof embodied in this abstract showing grantee at No. 6 and grantor at No. 7 are one and the same person." (2) Instrument No. 7 is a conveyance as shown in the *caption and body of the instrument by Hannah R. Mason alone*. The same instrument purports to be signed by P. W. Mason who appears from the acknowledgement to be her husband. The instrument is defective as it does not purport to convey the husband's interest."

Several conferences took place between the attorneys for the respective parties in relation to the defects in the title, and the assumption of some of the liens against the property by the purchaser was discussed. It satisfactorily appears from the entire record that the vendors were ready, able, and willing to remedy and cure all the defects pointed out except the two above referred to. These the vendors refused to remedy because they doubted their ability to do so, and the purchaser refused absolutely to accept the title or carry out the contract unless they were remedied. The contract was thereupon recorded, and this action was instituted to cancel the contract and remove the cloud from the title. The complaint alleged title in the plaintiffs, the execution of the contract of sale, the preparation and delivery of the abstract, the ability and willingness of the plaintiffs to perfect the title and carry out the terms of the contract, the refusal of the

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defendant to accept the title for the reasons above stated, the recording of the contract, that the defendant claimed some interest in the property, that such claim was without right, and prayed judgment quieting title in the plaintiffs and removing the cloud caused by the record of the contract.

In addition to the denials, the answer contained two affirmative defenses and a cross-complaint. The first affirmative defense was little more than an argumentative denial of the allegations of the complaint. The second affirmative defense alleged that the plaintiffs held title to the property in trust for A. T. Low, an alien, for the purpose of evading the constitution and laws of the state of Washington. This defense was stricken on motion. The cross-complaint set forth the contract, alleged that the defendant had fully performed on his part, that the plaintiffs were in default in many particulars, specifically pointed out, and prayed judgment for the return of the \$200 paid on the purchase price. The affirmative defense and cross-complaint were put in issue by reply. The court below awarded the defendant a personal judgment for the \$200 paid on the purchase price, with interest, and decreed that the payment of the money judgment should operate as a satisfaction and discharge of the contract of sale. From this judgment the plaintiffs have appealed.

The first error assigned is the denial of a motion to strike the cross-complaint. In an action to quiet title, the defendant may interpose any defense he may have to the action, and may assert any right or claim he may have in or to the property involved, by answer or cross-complaint, but a mere counterclaim for a money demand is not in our opinion permissible in this class of actions. *Dinan v. Coneys*, 143 N. Y. 544, 38 N. E. 715. The motion to strike should have been granted. If it appeared that the contract had been abandoned or could not be carried out through some default of the vendors, the court might doubtless have required the repayment of the purchase money as a condition precedent to the granting of

affirmative relief, on the principle that he who seeks equity must do equity, but under no circumstances could it render a personal judgment as for a money demand.

On the principal question involved, we infer from the language of the court in deciding the case that the appellants were denied the relief demanded because of their failure to tender a deed. This conclusion was correct, unless a tender was waived. But as we have already said, it affirmatively appears that the respondent rejected the title solely because the appellants refused to cure or correct the two defects we have referred to, and if the respondent was justified in this refusal the appellants were of course in default. On the other hand, if not so justified, readiness and willingness to perform on their part would take the place of actual performance, and a formal tender was waived.

"The maxim that the law does not compel one to do vain or useless things applies to the case of tender of performance of an obligation. Hence a tender is not necessary where it appears that, if made, it would have been fruitless. The general rule may be stated as follows: An actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due. It appears, then, that to excuse a failure to make an actual tender, there must be an existing capacity to perform, coupled with a state of facts which establishes the futility of making the tender." 28 Am. & Eng. Ency. Law (2d ed.), p. 5.

See, also, *Griesemer v. Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031; *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609.

Was the respondent justified in rejecting the title for either of the reasons assigned? The first objection, that the name "Hannah" was spelled with one "n" in one deed, and with two "n's" in another, and that she was a resident of Pierce County, Washington Territory, in 1870, and of Ben-

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ton county, Oregon, in 1880, is both technical and frivolous.

The second objection is equally untenable. There is some conflict of authority as to the effect of signing a deed by a party not named in the instrument, but in this case the husband was named in the body or warranty clause of the deed and covenanted that the wife was seized in fee simple; and his title, if any, would pass by estoppel if not by grant.

We are therefore of opinion that the contract was breached by the respondent, and that ability to perform, accompanied by a *bona fide* offer to perform, is all the law should require of the appellants. The judgment is reversed, with directions to enter judgment quieting title in the appellants as prayed in their complaint.

ROOT, MOUNT, CROW, and DUNBAR, JJ., concur.

HADLEY, C. J., and FULLERTON, J., took no part.

[No. 7247. Decided July 9, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Tolt Power
& Transportation Company, Plaintiff*, v. THE SUPERIOR
COURT FOR KING COUNTY *et al., Respondents*.¹

EMINENT DOMAIN—PARTIES ENTITLED—PUBLIC PURPOSES—POWER FOR COMMERCIAL USES. Laws 1907, p. 349, authorizing public service corporations to condemn property for commercial purposes, as a mere incident to their business as public service corporations, does not authorize a condemnation by a private corporation for the purposes of generating power for commercial purposes.

SAME—PRIVATE CORPORATIONS—OFFER TO SERVE PUBLIC. A corporation engaged in a business essentially private, viz., the establishment of a power plant for generating power to be sold for a profit, cannot by an offer to serve the public and submit to legislative control, convert itself into a public service corporation so as to acquire the right of eminent domain conferred on public service corporations by Laws 1907, p. 349.

¹Reported in 96 Pac. 519.

Certiorari to review an order of the superior court for King county, Griffin, J., entered February 8, 1908, upon sustaining a demurrer to the petition, dismissing a condemnation proceeding. Affirmed.

Chas. D. Fullen, for relator.

John A. Shackelford, for respondents.

RUDKIN, J.—The Tolt Power & Transportation Company is a corporation organized under the laws of this state, and is authorized by its articles of incorporation to develop, adapt, and utilize the water power of Tolt river, and all rivers and streams and bodies of water in this state, for commercial purposes, and to construct, operate and maintain a plant or plants for the electrical transmission of heat, light and power, from the source or sources of such power to all cities, towns, and places economically accessible, etc. As such corporation it instituted this proceeding in the court below to condemn and appropriate private property to be used in the development of water power for the purposes specified in its charter or articles of incorporation. A motion to dismiss in the nature of a demurrer was interposed to the petition, and the order sustaining the motion and dismissing the proceeding is now before us for review.

The relator frankly concedes at the outset that the principal questions involved in this proceeding are controlled by the decisions in *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842, and *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672, and we are asked to overrule these cases. The conclusions there announced, however, were only reached after extended argument and full consideration and we must at this time decline to either review or reconsider the questions there decided.

We will therefore confine ourselves to a discussion of the new questions presented by the record in this case. Our

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attention is first called to the act of March 18, 1907, Laws 1907, p. 349. That act by its terms only applies to corporations authorized to condemn property under the present laws of the state, for the purpose of generating and transferring electrical power for the operation of railroads or railways, or for municipal lighting, and authorizes such corporations to sell electric light outside the limits of municipalities, and electric power both inside and outside of such limits, to private consumers, from the electricity generated and transmitted for public purposes and not needed by them therefor. It will thus be seen that this act only authorizes public service corporations to condemn property for uses which this court has heretofore held to be private, as a mere incident to their business as public service corporations. It is manifest that the relator does not bring itself within the provisions of this act. Our attention is also directed to the following paragraph contained in the petition for condemnation:

"That said corporation has undertaken to, and agrees to undertake, and has and will assume and undertake to the state of Washington, and to the inhabitants thereof, all the duties and obligations of a public service corporation, and has so provided in its articles of incorporation, and now states and represents to the court that its purpose in developing said water power is to sell and dispose of all the electrical horse power which it, the said petitioner, may develop by virtue of the acquisition of water power privileges and sites to the general public, to the full extent of the power which it may secure, and that the petitioner does not intend, and it is not its purpose, to appropriate or use any power so developed for any private purposes of its own, and the said corporation by its articles of incorporation has, and it does now submit to all the duties, obligations and control which by law are, or may be, imposed upon like public service corporations. That your petitioner intends to sell under public restriction to individuals and public and private corporations such power as it may develop for the purpose of supplying factories, cities and public and private enterprises of every kind, the power which it intends to develop, at a reasonable profit to the petitioner."

This paragraph would become material if the petitioner was proceeding under the act of 1907 and was authorized to proceed thereunder, but as we have seen it is not so authorized, and a corporation engaged in a business essentially private cannot convert itself into a public service corporation, or acquire the powers vested in such corporations by a mere offer to serve the public and submit to legislative control. The matter contained in this paragraph will be found in substance in the petition considered by this court in *State ex rel. Harris v. Superior Court, supra*.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., CROW, FULLERTON, and DUNBAR, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 7315. Decided July 9, 1908.]

B. F. HICKS, *Respondent*, v. NATIONAL SURETY COMPANY
et al., *Appellants*.¹

CHattel Mortgages—Validity—Acknowledgment and Affidavit of Good Faith—Bill of Sale. Under Bal. Code, § 4558, a bill of sale given as security must be acknowledged and accompanied by an affidavit of good faith, or it will be void as against creditors or subsequent purchasers and incumbrancers, although valid as between the parties.

SAME—Bona Fide Incumbrancer—Priority of Liens. A surety company that takes a bill of sale as security for a pre-existing debt or contingent liability upon a breached contractor's bond, is not an incumbrancer for value in good faith, and its lien is inferior to that of a prior bill of sale valid as between the parties, although not executed so as to be valid as to creditors of the vendor or subsequent incumbrancers in good faith.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered December 16, 1907, upon find-

¹Reported in 96 Pac. 515.

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ings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a chattel mortgage. Affirmed.

Roberts & Hulbert, for appellants.

Pruyn & Felkner, for respondent.

RUDKIN, J.—On the 3d day of July, 1906, the defendant Farrell entered into a contract with the Kittitas Oil & Gas Company, whereby he agreed to bore a well for the oil company to the depth of 1,600 feet, on or before August 1, 1907, for the consideration of \$5,000, to be paid when the work was fully completed. To secure the faithful performance of this contract, and the return of any money that might be advanced thereunder, in case of failure to fully perform, the contractor gave a bond to the oil company in the penal sum of \$5,000, which was executed by the intervener as surety. On the 25th day of January, 1907, Farrell executed and delivered to the plaintiff, Hicks, a bill of sale of his drilling outfit to secure the payment of \$1,700. The bill of sale was absolute in form and was not acknowledged or accompanied by the affidavit of the vendor or mortgagor to the effect that it was made in good faith and without any design to hinder, delay or defraud creditors. The instrument was recorded in the Bills of Sale record of Kittitas county on the 28th day of January, 1907. On the 2d day of August, 1907, the oil company notified the contractor and the surety company that the contractor had breached his contract; that the oil company had advanced \$1,500 to the contractor, and that certain claims for labor and material were outstanding and unpaid. On the 12th day of August, 1907, Farrell executed and delivered to George W. Allen, as agent for the surety company, a bill of sale of the property included in the former bill of sale to the plaintiff Hicks, to secure and indemnify the surety company against any sums it might be required to pay by

reason of the indemnity bond. This bill of sale was duly acknowledged and accompanied by the affidavit of the vendor that it was made in good faith, etc., and was filed for record on the 13th day of August, 1907. The plaintiff instituted this action on the 19th day of August, 1907, for the recovery of the \$1,700 advanced by him to the defendant Farrell, averring that his bill of sale was intended as a chattel mortgage and praying a foreclosure thereof.

At the time of the commencement of this action, an order was obtained from the court directing the sheriff to forthwith take the property into his possession and to safely keep the same until the further order of the court. On the 23d day of September, 1907, the surety company intervened in the action by leave of court, and filed its complaint in intervention, setting forth its rights under the bill of sale to its agent, and alleging that the bill of sale under which the plaintiff claimed was void, because not acknowledged or accompanied by the affidavit of good faith as required by law. The plaintiff joined issue on the complaint in intervention, and the cause came on regularly for trial. The court below found that the lien of the plaintiff was prior and superior to the lien of the intervener, and gave judgment accordingly. From that judgment the present appeal is prosecuted, and the question of priority between the two liens is the only question presented for our consideration.

A bill of sale given as security must be acknowledged and accompanied by the affidavit of good faith required by Bal. Code, § 4558 (P. C. § 6531), or the same will be void as against creditors of the vendor or subsequent purchasers and incumbrancers of the property for value and in good faith. *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022. But a chattel mortgage or bill of sale is good as between the parties, though not acknowledged or accompanied by the affidavit of good faith as required by the above section. *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Roy & Co. v.*

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Scott, Hartley & Co., 11 Wash. 399, 39 Pac. 679; *Mendenhall v. Kratz*, 14 Wash. 453, 44 Pac. 872; *Strahorn etc. Commission Co. v. Florer*, 7 Okl. 499, 54 Pac. 710.

It will further be observed:

"That this statute makes a broad distinction between creditors and subsequent purchasers or incumbrancers. As to the former it positively declares that chattel mortgages are void unless they are accompanied by the specified affidavit and are acknowledged and recorded as required by law. But an incumbrancer or subsequent purchaser, in order to avail himself of an omission of the affidavit, or of a failure to acknowledge or record the instrument, must be able to show that he is an incumbrancer for value and in good faith." *Mendenhall v. Kratz*, *supra*.

The instrument under which the appellant claims was taken as security for a pre-existing debt or a pre-existing contingent liability. Under such circumstances does it come within the definition of an incumbrancer for value and in good faith, as that term is defined in law? Under the great weight of authority it does not. *People's Savings Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754; *Gest v. Packwood*, 34 Fed. 377; *Id.*, 39 Fed. 525; *Franklin Savings Bank v. Taylor*, 53 Fed. 854; *The Elmbank*, 72 Fed. 610; *Napa Valley Wine Co. v. Rinehart*, 42 Mo. App. 171; *Milton v. Boyd*, 49 N. J. Eq. 142, 22 Atl. 1078; *Hill v. Shrygley*, 51 Ark. 56, 9 S. W. 845; *Kohl v. Lynn*, 34 Mich. 360; *Jones v. Graham*, 77 N. Y. 628; 23 Am. & Eng. Ency. Law (2d ed.), p. 492, and cases cited.

Inasmuch as the lien under which the respondent claims is first in point of time and is valid between the parties, and the appellant is not an incumbrancer of the property for value and in good faith, the judgment must be affirmed, and it is so ordered.

HADLEY, C. J., MOUNT, and FULLERTON, JJ., concur.

DUNBAR and CROW, JJ., took no part.

[No. 7448. Decided July 11, 1908.]

H. J. MILLS, *Respondent*, v. SEATTLE, RENTON & SOUTHERN
RAILWAY COMPANY, *Appellant*.¹

CARRIERS—PASSENGERS—TAKING WRONG CAR—TRANSFERS—TICKETS—TRESPASSERS—EJECTION—OPERATION OF STREET CARS—PERFORMANCE BY CARRIER / Where a passenger by mistake and without fault of the company boarded a street car having placards indicating that it ran only to a point two miles short of his destination, with a ticket of a form common to several stations entitling him to ride over the line to his destination, he is not entitled to a transfer upon the car's reaching the end of its run, contrary to rules of the company; since the company is not bound to run all its cars the entire length of its line or provide transfers from one car to another; and upon refusing to leave the car at the end of its run the passenger becomes a trespasser and cannot recover for ejection. /

SAME—TRESPASSERS—EJECTION—ASSAULT. A street car company is liable to a passenger who had become a trespasser, if ejected while the car was in motion so as to endanger life or limb, or if willfully assaulted with unnecessary force by the conductor.

SAME—TRESPASSERS—ASSAULT—BY SERVANT—SCOPE OF EMPLOYMENT. A street car company is not liable to a passenger who had become a trespasser, for an assault committed by one employed as a greaser, who had nothing to do with the operation of the cars, while attempting an ejection from the car, unless the greaser was assisting the conductor and used more force than was necessary; since the ejection was outside the scope of the greaser's employment.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 14, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger ejected from a street car. Reversed.

Sachs & Hale, for appellant.

John E. Ryan, for respondent.

RUDKIN, J.—The defendant owns and operates a line of electric railway between the city of Seattle and the town of Renton, in King county. Cars starting out from the city of

¹Reported in 96 Pac. 520.

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Seattle run to different points or stations on the line of the road, such as Graham Avenue, Ocean Beach, Rainier Beach, and Taylor's mill. Each car has a notice at the front and rear of the car showing its destination. The five cent fare limit is Graham Avenue. Beyond this point tickets to Seattle and return are sold by the conductors on the several cars. Return trip tickets are not sold to each individual station or stopping place, but one general form of ticket is used for all stations to which the rate or fare is the same, and the tickets are good to the farthestmost station from the city of Seattle. Thus, passengers purchasing tickets to Seattle and return from Brighton Beach, Ocean Beach, and Rainier Beach, will all receive the same form of ticket, and there is nothing on the face of the ticket to mark or indicate the passenger's destination.

On the morning of March 25th, 1907, the plaintiff in this action took passage on one of the defendant's cars at Rainier Beach, and purchased a ticket to Seattle and return. On the evening of that day he boarded another of the defendant's cars at the city of Seattle for the return trip to Rainier Beach. The notice at the front and rear of the car thus boarded showed that the destination of the car was Ocean Beach, a point about two miles nearer Seattle than Rainier Beach, and such was its destination in fact. No questions were asked by the plaintiff as to the destination of the car and no information was given by him as to his own destination. The conductor took up the tickets, and when the car reached Ocean Beach the plaintiff was informed that the car had reached its destination and was about to return to the barn, and that he, the plaintiff, must leave the car. The plaintiff refused to leave the car, but demanded from the conductor a transfer or other evidence of his right to take another car to his destination at Rainier Beach. This the conductor refused to give, and had no authority to give under the rules of the company. After remaining at Ocean Beach

for about five minutes the car started back towards the barn with the plaintiff still on board. Up to this point there was no conflict in the testimony, and no question of fact for the jury to pass upon. When the car had returned to a point near Brighton Beach, about two miles from Ocean Beach, a conflict arose between the plaintiff and the conductor of the car, or a greaser in the employ of the defendant, or between the plaintiff and both the conductor and the greaser, as a result of which the plaintiff was ejected from the car and assaulted. This action was instituted to recover damages for the wrongful ejection and for the assault; and from a judgment in favor of the plaintiff, the present appeal is prosecuted.

The following instruction, and others of like import, defining the relative rights and duties of common carriers and their passengers, were excepted to, and the giving of these instructions is assigned as error:

"I instruct you, gentlemen of the jury, that if you find from a fair preponderance of the evidence in this case, that the plaintiff, on or about the 25th day of March, 1907, had in his possession a ticket entitling the plaintiff to ride as a passenger upon one of the defendant's cars from the city of Seattle to Rainier Beach, and that it was printed upon the face of the ticket that the plaintiff was entitled to passage from the city of Seattle to Rainier Beach, and if you further find that he went in the car of defendant in good faith believing that he was entitled to ride upon the car of defendant upon which he entered as a passenger from the city of Seattle to Rainier Beach, then he became a passenger of defendant from the city of Seattle to Rainier Beach for hire and was entitled to be transported by defendant as a passenger, and was entitled to all the rights and duties and privileges of a passenger for hire upon that street railway line from the city of Seattle to Rainier Beach."

These several assignments must be sustained. The appellant was not required to run all of its cars the entire length of its line, nor to provide for the transfer of passengers from

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one car to another. It might run its cars to such points or stations as would best subserve its own convenience and the convenience of the traveling public, and require passengers to take such cars only as would transport them to their destination without change. This the appellant did and no more. The respondent took the wrong car by mistake, without fault on the part of the appellant or its agents, and for this mistake and the injury flowing therefrom he alone is responsible. As soon as the car destined for Ocean Beach had reached its destination, and the respondent was informed of that fact and requested to leave the car, it was his duty to do so, and as soon as he was given a reasonable opportunity to leave the car and refused, the relation of carrier and passenger ceased and the respondent became a trespasser from that time forward. The appellant thereafter owed him such duty as it owes to trespassers and none other, and these facts appearing from the uncontroverted testimony, the court should have so charged the jury. These errors call for a reversal of the judgment, but not for a dismissal of the action. As a trespasser, the employees of the appellant might use such force as was reasonably necessary to eject the respondent from the car, in case he refused to leave of his own accord, but they could not lawfully eject him while the car was in motion, so as to endanger life or limb, nor could they wilfully or unnecessarily assault him with impunity. The rights of common carriers and their employees in ejecting trespassers from cars were thus stated in *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108:

"The rule is that, in removing trespassers from a train, the employees of the company may use such force as appears reasonably necessary, under all the circumstances, to accomplish the end in view; and, if the trespasser offers forcible resistance, a jury should not weigh with too much nicety the degree of force resorted to."

In this case there was some testimony tending to show that a wilful and unprovoked assault had been committed, and the

weight of this testimony was for the jury. The appellant requested the court to charge the jury that it was in no event liable for the assault committed by the employee called the greaser. This employee had nothing to do with the operation of the cars or with the receiving or discharging of passengers, and for an assault committed by him of his own volition and without the scope of his employment, the company of course would not be liable. If, on the other hand, this employee was assisting the conductor in ejecting the respondent from the car, at the express or implied request of the conductor, the appellant would be liable for his acts in that connection.

The other assignments are not of sufficient importance to call for consideration or discussion, but for error in the instructions complained of, the judgment is reversed and the cause remanded for a new trial.

HADLEY, C. J., FULLERTON, MOUNT, ROOT, DUNBAR, and CROW, JJ., concur.

[No. 7177. Decided July 11, 1908.]

MAX GARRETSON, *by his Guardian etc., Respondent*, v.
TACOMA RAILWAY & POWER COMPANY, *Appellant*.¹

ELECTRICITY—ACTIONS FOR INJURIES—SHOP—EVIDENCE—SUFFICIENCY. There is sufficient evidence that a street car company's trolley wire carried an electric current, and that it was the source of a shock to the plaintiff, where it appears that the company was operating street cars in the city by electricity conveyed to the cars by trolley, that wires without insulation connected the trolley with a lamp wire handled by the plaintiff at a certain street corner, and that plaintiff received an electric shock while handling the lamp wire, shortly after a trolley car had passed that point, although there was conjectural evidence that the shock may have come from some other source.

TRIAL—QUESTIONS FOR JURY. The preponderance of conflicting evidence is a question for the jury.

¹Reported in 96 Pac. 511.

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Opinion Per FULLERTON, J.

ELECTRICITY—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A street car company is liable to a city employee, a lamp trimmer, for injuries caused by the fact that its guy wire had been negligently changed by city employees from the company's pole to a city pole, making the trimmer's work dangerous, where, after such change, the company took down the wire and replaced it in the same situation without proper insulation.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 16, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an electric light trimmer through defective insulation of electric wires. Affirmed.

Fitch & Jacobs, for appellant.

A. H. Garretson and R. S. Holt, for respondent.

FULLERTON, J.—The appellant maintains and operates an electric railway in the city of Tacoma. The city of Tacoma owns and operates an electric lighting plant, and maintains electric lights at points along the streets over which the appellant operates its railway. The respondent, Max Garretson, was in the employ of the city in the capacity of an electric light trimmer, and was injured while in the performance of his duties by an electric current which he alleged came from the trolley wire of the appellant's railway, the fastenings and insulators to which had been negligently suffered to become and remain out of repair. The situs of the accident was at a curve in the railway track, and to maintain the trolley wire over the center of the track at that place, a somewhat complicated, although common, arrangement of wires was resorted to. The several trolley supports or hangers were fastened to heavy guard wires, placed one on each side of the trolley and parallel therewith, to which guy wires were attached and carried back and fastened to poles erected along the side of the street. The guard wire on the convex side of the trolley curve was fastened to the eyes of the hangers, a distance of some $2\frac{1}{4}$ inches from the trolley wire.

As originally constructed, the guy wires holding the trolley at this point were fastened to the appellant's own poles, and contained insulators preventing any escaping electric current from reaching the ground by way of the poles, but it appears that the city's employees, for reasons not stated in the record, something over a year prior to the accident, had removed the wire from the appellant's pole to one belonging to the city, and that afterwards the appellant's employees took down and again replaced the trolley, refastening the guy wire to the same pole. In one of these changes, the insulator was removed. The city's lamp was supported by wires attached to this pole, and was so arranged that the trimmer could raise and lower the lamp by means of a flexible wire which passed through a pully near the top of the pole and then extended downward to within his reach from the ground. The guy wire, by being fastened to the city's pole, was brought in direct contact with the wire the respondent was obliged to handle in trimming the electric lamp, and he received the shock which caused his injury when he took hold of the flexible wire above mentioned for the purpose of lowering the lamp so that it could be trimmed from his position on the ground. It was the respondent's contention that the guard wire placed parallel with the trolley wire had become bent so that it touched the trolley wire, thus receiving the current and communicating the same to the guy wire, which in turn communicated it to the wire which the respondent was required in the course of his duty to handle. At the trial the jury returned a verdict in favor of the respondent for the sum of \$500, and for this sum judgment was entered in his favor. The railway company appeals.

The appellant has reduced its assignments of error to four principal contentions, the first of which is that there is no evidence which shows, or tends to show, that the trolley wire of the appellant company was charged with electricity, or carried an electric current at the time of the accident. In brief the proofs on this point were these: (1) the admission in the

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answer of the appellant to the effect that it was operating a line of street cars in the city of Tacoma by the force of electricity, conveyed to the cars by trolley wires; (2) that a car of the company passed the point of the accident just prior to the happening of the accident; (3) that the guard wire supporting the trolley wire had become bent so that it touched the trolley wire; (4) that the guard wire connected with the guy wire which was without insulation, and which was fastened to a pole on which was suspended a wire connected with an electric lamp; and (5) that the respondent received an electric shock when he took hold of the lamp wire. This, it seems to us, is evidence tending to prove the point. The presence of an electric current is usually determined by the phenomena its presence produces, and here all of the phenomena pointed to that end. There was a connection with a wire along which an electric current was usually carried, and a resultant shock. This is evidence of the presence of a current of electricity in the wire.

The second contention is that there is no evidence establishing with certainty the source from which the current causing the shock came; that the proofs show that it is just as probable that it came from the city's electric light wire as it is that it came from the wires of the appellant company. But we cannot so view the record. As we have shown, there was evidence showing a direct connection between the wire from which the shock was received and the appellant's trolley wire which carried a current of electricity. The evidence that it might have come from another source was merely conjectural; the witnesses stating, when the direct question was asked them, that it was possible that the current could have come from another source than the appellant's wires. But this does not necessitate the holding that there was a failure of proof as a matter of law. The respondent was not required to establish his case beyond a reasonable doubt. As in all human affairs there is an element of uncertainty, the law must deal with conditions in a practical way, and it demands only

reasonable certainty as the basis of a civil claim; that degree of certainty which reasonable men will rely upon when dealing with the ordinary affairs of life. There was at least this degree of certainty in the evidence in the case before us.

The third contention is that the proofs failed to show that the appellant's injuries were caused by the electric shock he received. But on this point the most that can be said is that the evidence is conflicting. In such a case its preponderance is for the jury.

Lastly, it is contended that there is no evidence of negligence on the part of the appellant. It is thought that since the city's employees first removed the wire from the company's pole to the pole of the city, there is no liability on the part of the company to answer for any injury done to an employee of the city by reason of such change. But such is not the rule. The company owed to every one the duty of keeping its wires in a reasonable state of repair, and if it discovered, or by reasonable diligence might have discovered, that this guy wire made the duties of the light trimmer hazardous or dangerous, it was its duty to correct the fault, and it is of course responsible for the neglect of that duty. That it did know, or ought to have known of its dangerous condition, the record abundantly shows—in fact it took the wire down and replaced it long after the time the city made the original removal. It may be that it did not know of the bent condition of the guard wire in time to repair it before the accident, but this is not material. This was a condition it ought to have anticipated and so insulated the guy wires as to prevent the circuit from escaping even should the guard wire touch the trolley wire.

As we view the record, the evidence justified the verdict, and the judgment entered thereon should be affirmed. It is so ordered.

HADLEY, C. J., RUDKIN, MOUNT, ROOT, DUNBAR, and CROW, JJ., concur.

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Syllabus.

[No. 7253. Decided July 11, 1908.]

KITSAP COUNTY, *Respondent*, v. MARINUS MELKER *et al.*,
Appellants.¹

EMINENT DOMAIN—PROCEEDINGS—NOTICE—SERVICE OF PETITION—COUNTY ROAD. Under Bal. Code, § 5638, requiring that the notice in condemnation for a county road shall state when the petition will be heard and contain a brief recital of the objects of the petition, it is not necessary to serve a copy of the petition with the notice.

SAME—NOTICE—SUFFICIENCY. A notice in condemnation for a county road under Bal. Code, § 5638, need not contain the name of the proposed road, nor a description of property remaining to the owners after condemnation, nor reference to compensation to be awarded; but is sufficient where it complies with the statute.

SAME—TIME FOR FILING PETITION. The time of filing a petition for the condemnation of a county road is not jurisdictional, the statute not providing when it shall be filed, and it is sufficient if filed on the return day.

SAME—HEARING—CONTINUANCE—FAILURE TO ORDER—NOTICE OF HEARING. A failure to hear a condemnation proceeding on the return day, and adjourning without continuance to a day certain, does not work a discontinuance of the proceedings, but the same can be brought on for hearing by notice as provided for an ordinary civil action.

SAME—ORDER OF DEFAULT—APPEAL—HARMLESS ERROR. An order of default against owners appearing specially to object to condemnation proceedings for a county road is without prejudice where they were permitted to appear and be heard on the question of damages.

SAME—ADJUDICATION OF PUBLIC USE—NECESSITY. If an order is necessary adjudging a public use for the condemnation of a county road, failure to enter it prior to setting the cause for hearing on the question of damages would be but an irregularity without prejudice.

SAME—COMPENSATION—SET-OFF—BENEFITS TO LANDS NOT TAKEN. The constitutional requirement (art. 1, § 16) that property taken or damaged be paid for irrespective of benefits conferred on the land not taken, does not apply to condemnations for the purposes of a county road.

SAME—ASSESSMENT OF DAMAGES—VERDICT—NOMINAL DAMAGES. In a condemnation proceeding an award of nominal damages is a sufficient verdict.

¹Reported in 96 Pac. 695.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered January 6, 1908, upon the verdict of a jury assessing nominal damages in a proceeding to condemn a right of way for a county road. Affirmed.

James W. Bryan, for appellants.

C. D. Sutton, for respondent.

FULLERTON, J.—This is an appeal from a judgment entered in an action brought by the county of Kitsap against the appellants to condemn a right of way for a county road across the appellants' land. The several assignments of error all relate to the proceedings had in the superior court, and will be noticed in their order.

On serving the statutory notice of the institution of the proceedings, provided for by Bal. Code, § 5638 (P. C. § 5103), the county did not serve therewith a copy of the petition provided for in the next preceding section, and it is thought from this fact that the court did not acquire jurisdiction of the persons of the appellants, and hence was without jurisdiction to enter the judgment of condemnation. An examination of the statute, however, convinces us that it was not the intention to require that the petition be served along with the notice. The statute does not in terms so provide, and any inferences that arise from what is provided seem to point the other way. In addition to the requirement that the notice shall state the time when and the place where the petition will be presented to the court, it is required that it shall contain a brief recital of the objects of the petition and a description of the property sought to be appropriated. This latter requirement would be useless were it intended that the petition should be served along with the notice, as the petition itself could be relied upon to inform the persons served of its own contents. But it is said that the notice did not contain the name of the proposed road, nor a description of the property remaining belonging to the owners after the

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part required for the road should be taken, nor did it contain any reference to compensation to be awarded as damages to the property not taken. But as to these objections, it is sufficient to say that the statute does not require the notice to contain these matters. It did contain a description by courses and distances of the proposed road, a description of the property proposed to be taken belonging to the appellants, and a statement to the effect that the county would ask to have the property described condemned for a county highway, and that just compensation be awarded the owners for the property taken or damaged, to be ascertained either by a jury or by the court as the law prescribes. This was a sufficient compliance with the statute.

The petition was not filed until the return day of the notice, and it is objected that this is fatal to the proceedings. But aside from the fact that the statute does not provide for filing the petition at any particular time, the time of its filing is not jurisdictional. While the statute contemplates that the petition shall be filed in court at some stage of the proceedings, it is not material whether it be filed before or at the time of the issuance of the notice or at the time of its return.

On the return day provided for in the notice, the appellants appeared specially and filed a motion to quash the proceedings. No further proceedings were taken therein until some time later, when the county noticed the proceedings for hearing in the manner provided for bringing on for hearing ordinary civil causes. In response to the notice, the appellants again appeared specially and objected to the hearing on the ground that the court had lost jurisdiction over the cause, even if it had originally acquired it, because the cause had not been continued on the first appearance of the parties to a time certain, and this objection is urged in this court as a ground for vacating the judgment. The statutes relating to proceedings in eminent domain seem to lend color to the claim that the statute contemplates either a hearing and determina-

tion of the cause on the return day or a continuance to a day certain, but we think a failure to do one or the other of these things cannot work a discontinuance of the proceedings. The superior court has jurisdiction over the subject-matter of the proceedings by virtue of the statute, and acquires jurisdiction over the persons of the owners of the property sought to be condemned by the service of the prescribed notice, and it does not lose jurisdiction by a failure to make an order of continuance. The proceedings stand as a cause pending, like an ordinary pending civil action, and can be brought on for hearing by notice such as the statute provides for bringing on for hearing the issues made in an ordinary civil action. As the county followed this procedure in the present proceeding, we hold it to be regular.

It is next complained that the appellants were prejudiced by an order of default entered against them because they failed to make a general appearance in the cause, but we find nothing in the record to substantiate the complaint. The order may have been unnecessary, but as the appellants were permitted to appear before the jury, both in person and with witnesses, and show the amount of damages suffered by them by reason of the establishment of the proposed highway, the order was utterly immaterial. Outside of their right to question the power and jurisdiction of the court to order an appropriation of their property—a question they did suggest at every stage of the proceedings—the right to show the damages suffered by them was their only right. And as the court gave them ample opportunity to do this, we do not see in what way they were prejudiced.

The court did not enter the order adjudging the use sought to be made of the property proposed to be taken to be a public use until after it had set the case down for trial as to the damages. This is thought also to require a dismissal of the proceedings. It may be questioned whether the order was necessary at all under the authority of the case of *State*

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ex rel. Schroeder v. Superior Court, 29 Wash. 1, 69 Pac. 366, but, if such an order was necessary, failure to enter it prior to setting the case for hearing on the question of damages was but an irregularity which in no manner could prejudice the appellants.

The court instructed the jury that, in estimating the appellants' damages, they could take into consideration the difference, if any, between the value of the land after the road should be established and its present value; and that, if they found that the land would be actually benefited by the establishment of the proposed road, they should offset the benefits so found against any damages the appellants would suffer by such establishment, finding in favor of the land owner for nominal damages in any event. It is urged that this instruction is in violation of § 16 of art. 1 of the state constitution, as that section, properly construed, forbids the appropriation of property for a right of way until full compensation is made therefor irrespective of any benefit to the remaining property caused by the location of a public highway over the lands so taken. But this court has given this section of the constitution the opposite construction. We have held that the requirement that the property taken or damaged be paid for irrespective of the benefits conferred on the remainder did not apply where the taking was by a municipal corporation, but that the rule followed by the trial court prevailed in such cases. *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Kaufman v. Tacoma, Olympia & G. H. R. Co.*, 11 Wash. 632, 40 Pac. 137; *Jones v. Seattle*, 23 Wash. 753, 63 Pac. 553; *Lincoln County v. Brock*, 37 Wash. 14, 79 Pac. 477; *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261. If the question were one of first impression, the proper construction of this section of the constitution might be debatable, but these cases foreclose the question. The rule is too firmly established to be departed from.

The appellants also seem to question the sufficiency of the evidence to sustain the several verdicts awarding damages to the different claimants, but a perusal of the record clearly shows substantial evidence sustaining each of the verdicts, and this is sufficient in this court.

The jury returned verdicts finding in favor of certain of the appellants for nominal damages only. It is objected that this is insufficient, as the jury should have been required to find specifically the amount of damages suffered and the amount of benefits conferred. But this objection is untenable. The ultimate conclusion of the jury is all that is necessary to be returned to constitute a legal verdict.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, MOUNT, ROOT, DUNBAR, and CROW, JJ., concur.

[No. 7404. Decided July 11, 1908.]

CHRIS HOWLAND, *Respondent*, v. STANDARD MILLING & LOGGING COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—EVIDENCE—SUFFICIENCY. It is negligence to remove one of the pulleys supporting a haul-back cable connected with a donkey engine used in hauling logs in the woods, thereby dropping the cable to the ground so that it caught on an obstruction, where it was known that it was the custom of the plaintiff, an employee attending the haul, to ride back on a sled pulled by the line, and that he would soon come within the zone of danger caused by taking away the support.

SAME—FELLOW SERVANTS—VICE PRINCIPALS—SAFE PLACE. In such case, the act of a co-laborer in taking away the support, by order of the foreman, is not the act of a fellow servant, but of a vice principal, since it was the master's duty to provide a safe place to work, and the foreman and co-laborer both represented the master in removing the block.

SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In such a case the plaintiff's contributory neg-

¹Reported in 96 Pac. 686.

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ligence, and his assumption of risks, is for the jury, where he testified that he did not notice the changed conditions, and there is room for a reasonable difference of opinion.

SAME—ASSUMPTION OF RISKS. A laborer in a logging camp riding on the bite of the cable line in front of the tail block, which practice was dangerous from the fact that the tail block might give way, does not assume the risk from other dangers caused by reason of the negligent taking away of a support of the line, unknown to him, where his injury was not caused by the tail block.

SAME—CUSTOMARY METHODS. Where one is injured by the negligence of the master while pursuing his work in the customary way of doing the work, the accident not being the result of natural conditions, whether he ought to have adopted some other way is a question of fact for the jury and not of law for the court.

Appeal from an order of the superior court for King county, Frater, J., entered January 17, 1908, granting a new trial, after a judgment rendered by direction of the court in favor of the defendant, in an action for personal injuries sustained by an employee of a logging camp. Affirmed.

Roberts & Hulbert, for appellant.

Blaine, Tucker & Hyland, and *Robert C. Saunders*, for respondent.

FULLETON, J.—The respondent was injured while working in the logging camp of the appellant, and brought this action to recover therefor, alleging that his injuries were caused by the negligence of the appellant. At the trial, which was being had before a jury, the court sustained a challenge to the sufficiency of the evidence, discharged the jury, and directed judgment to be entered in favor of the appellant to the effect that the respondent take nothing by his action. The respondent thereupon moved for a new trial, which motion the court, after taking the same under advisement, granted, reinstating the case for another trial by jury. From the order granting the new trial, this appeal is taken.

In its logging operations the appellant was using two donkey engines, one, the yard donkey, to drag the logs from

the place in the woods where they were felled to the main logging road or skidway, and the other, the road donkey, to drag them from the latter place to the milling plant of the appellant where they were cut into lumber. These donkeys were stationary and hauled the logs by means of steel cables long enough to extend from the engines to the location of the logs. The cable on the road engine was carried back by means of a second cable, called a haul-back line, smaller in size than the logging cable, which was passed through a series of pulleys fastened at intervals along the side of the logging road to a point somewhat beyond the logs desired to be hauled, where it passed through a pulley called a tail block and was then fastened to the end of the logging cable. As the logging cable was drawn in toward the road donkey, dragging its load of logs, the haul-back line was paid out, and was in turn hauled in when it was desired to haul the heavy cable back to the woods. It was the respondent's duty to hitch the logs to the heavy cable, follow them to the dumping place, release them from the cable, and then follow the cable back for another load of logs. The chains and hooks used in hitching the logs to the cable were carried back to the woods by means of a sled fastened to the cable and drawn back to the woods by the haul-back line. It was the respondent's custom to ride back on this sled. Just prior to the time of the accident, a co-laborer working with the yard donkey, acting under the direction of the appellant's foreman, without notice to the respondent and without his knowledge, removed one of the pulleys near the tail block, letting the haul-back line drop on the ground. In dropping, the line caught on a projecting root which held it in place while the main road line was being hauled back. It held in that position until the sled on which the respondent was riding reached a point near it, when it gave way allowing the line to swing against the respondent with such force as to break one of his legs at the ankle. It is this injury for which he sues.

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The appellant contends, (1) that the evidence fails to show any negligence on the part of the appellant; (2) that if there was negligence of any person, it was the negligence of a fellow servant of the respondent; (3) that the danger was open and apparent, and the respondent assumed the risk, and was guilty of contributory negligence; (4) and that there were two or more ways for doing the work the respondent was required to do, only one of which was unsafe, and the respondent voluntarily chose the unsafe way.

As to the first objection, it would seem that some one was grossly negligent in the matters connected with the removal of the guide pulley. It may be that the mere taking away of the pulley was not negligence, but this act required a readjustment of the haul-back line between the remaining permanent fastenings, and it was negligence not to see to it that it readjusted itself naturally, and did not catch and hang onto temporary obstructions to readjust itself by the strain when some one got into the zone of danger. And especially was it negligence when it was known that the respondent was in the habit of working in the exposed places, and that his duties would, in the course of a short time, bring him therein. The danger to the respondent caused by the line catching on some obstacle which would give way when the strain increased, was one that ought to have been foreseen and guarded against when the change in the pulley was made, and to fail to do so is negligence.

Nor do we think the act which rendered the place unsafe was the act of a fellow servant of the respondent. It is the fundamental duty of the master to make and keep safe the place in which he requires his servants to work, and this duty cannot be delegated so as to relieve the master from liability for a negligent performance of the duty. The facts of this case bring it within the rule. In the furtherance of the master's business, which was being conducted under the immediate direction of its foreman, the place wherein the respondent

was required to work was converted by order of the foreman from one reasonably safe to one highly dangerous. Both the foreman who ordered the block removed and the man who actually performed the work represented the master in this particular, and the master is responsible for their negligent acts.

The claim that the respondent assumed the risk and was guilty of contributory negligence were at best but questions of fact for the jury. The respondent testified that he did not notice the changed conditions until about the time the accident happened. Whether the change was so apparent that he ought to have observed it, is a question on which reasonable minds might reasonably differ, and its determination should have been left to the jury. It is argued, however, in this connection that the respondent cannot recover, because he voluntarily placed himself in a place dangerous even under normal conditions, in that he rode down into the bite of the line. By the bite of the line is meant the place between the lines immediately in front of the tail block, and is dangerous because the tail block may give way. It may be that had the respondent been injured by the giving way of the tail block he could not recover for his injuries, on the ground that he had assumed the risk. But it is not the rule that a servant who goes into a dangerous situation assumes the risk of all dangers surrounding the place. He assumes those dangers only which are inherent in and which exist from the nature of business—those dangers against which there is no absolute protection, not those caused by some negligent act of the master and which would not exist but for such negligent act. The master is not relieved from liability for negligent acts which would otherwise render him liable, merely because the servant took a situation rendered dangerous from other causes when such other causes did not contribute to his injury.

The remaining objection is mainly answered by what is said concerning the objection that the respondent assumed the

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Citations of Counsel.

risk of injury. The respondent could, of course, have escaped injury by not going between the lines at all while the strain was on them, but it was shown that he pursued the customary way of doing the work, and that the accident which caused his injury was not the result of the natural conditions. At best, therefore, it was a question for the jury to decide whether he ought to have kept outside the lines, not one for the determination of the court as a matter of law. The order of the court granting a new trial was well within its discretion, and will stand affirmed.

HADLEY, C. J., RUDKIN, DUNBAR, and CROW, JJ., concur.

MOUNT AND ROOT, JJ., took no part.

[No. 7410. Decided July 11, 1908.]

S. WADE HAMPTON, *Respondent*, v. JAMES BUCHANAN *et al.*,
Appellants.¹

APPEAL AND ERROR—RIGHT TO APPEAL—GIVING OF STAY BOND—EFFECT. The giving of a bond to stay execution of a judgment, does not operate to prevent an appeal from the judgment, since the statute, Bal. Code, §§ 5205, 5206, does not so provide and the stay bond only creates an obligation to pay the judgment at the end of the period fixed for the stay, which assumes a valid judgment existing at that time.

Motion to dismiss an appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 7, 1908. Denied.

Frank D. Oakley and Charles Bedford, for appellants, cited: 2 Cyc. 657, note 16; *Churchill v. Alpena Circuit Judge*, 56 Mich. 536, 23 N. W. 211; *Ranck v. Becker*, 12 Serg. & Rawle 412; *Nealy v. Sexton*, Wright (Ohio) 314; *Russell v. Giles*, 31 Ohio St. 293; *Pratt v. Page*, 18 Wis. 355; *Dyett v. Pendleton*, 8 Cowen 325; *Knapp v. Brown*, 45 N. Y.

¹Reported in 96 Pac. 518.

207; *Hyer v. Norton*, 26 Ind. 269; *Kellar v. Williams*, 10 Bush. (Ky.) 216. Even the payment of a judgment (involuntarily by the almost unanimous weight of authority, and voluntarily by the great weight of authority) is not a waiver of errors, and does not prevent the defendant from appealing unless such payment was by way of compromise or with an agreement not to take or pursue an appeal. 2 Cyc. 647, b. 1-11, and notes thereunder; *Hayes v. Nourse*, 107 N. Y. 577, 14 N. E. 508, 1 Am. St. 891; *MacEvitt v. Maass*, 64 App. Div. 382, 72 N. Y. Supp. 158; *Lumaghi v. Abt* (Mo.), 103 S. W. 104; *Warner Bros. Co. v. Freud*, 131 Cal. 639, 63 Pac. 1017, 82 Am. St. 400; Elliott, Appellate Procedure, § 152; the monographic note in 45 Am. St. Reports, commencing on page 271 (*State v. Conkling*, 54 Kan. 108, 37 Pac. 992); *Dodds v. Gregson*, 35 Wash. 402, 77 Pac. 791.

Blattner & Chester, for respondent, cited: *Jones v. Bomberger*, 97 Pa. St. 432; *Seacrest v. Newman*, 19 Iowa 323; *People ex rel. Reynolds v. Judges of Macomb Circuit Court*, 1 Mich. 134.

FULLERTON, J.—On February 7, 1908, the superior court of Pierce county rendered judgment in favor of the respondent and against the appellants in the sum of \$5,487.08 principal, and \$22.80 costs, which judgment was declared to be a lien upon certain described property belonging to the appellants. On February 20, 1908, an execution was issued on the judgment and placed in the hands of the sheriff for service, who proceeded to levy upon the property on which the judgment was declared to be a lien. Thereupon the appellants, as principals, with J. C. Buchanan and C. O. Boose, as sureties, executed and lodged with the clerk of the court where the judgment was rendered a stay bond, conditioned as provided in § 5205 of Bal. Code (P. C. § 825). On the 23d day of the same month, a notice of appeal was served and a bond

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given by which the cause was brought into this court. The respondent moved to dismiss the appeal, basing his motion on the ground that the appellants have, by giving the stay bond, assumed an unconditional obligation to pay the judgment which they must perform in any event at the expiration of the period of stay, regardless of any disposition of the cause this court may make upon the appeal, and that, by reason thereof, the appeal does not present a live question.

Whether a judgment debtor assumes an unconditional obligation to satisfy a judgment rendered against him by giving a statutory bond for a stay of execution depends upon the effect that is to be given to the sections of the statute providing for the stay, as there is no direct provision denying to the judgment debtor the right to prosecute the remedy of appeal after giving the stay bond. The sections bearing upon the question are the following:

“Before any execution shall be stayed under the provisions of this chapter, the defendant shall give bond to the opposite party in double the amount of the judgment and costs, with surety, to the satisfaction of the clerk, conditioned to pay said judgment, interest, costs, and increased costs at the expiration of the period of said stay.

“If the judgment is not satisfied at any time after the expiration of the period for which execution has been stayed, the plaintiff may, upon motion supported by an affidavit that such judgment, or any part thereof, is unpaid, and stating how much still remains due thereon, have judgment against the sureties upon said bond for the balance remaining due, and have an execution therefor, upon which no stay shall be allowed.” Bal. Code, §§ 5205, 5206 (P. C. §§ 825, 826).

A literal construction of these provisions of the statute would undoubtedly lend color to the respondent's contention, but we think they must be construed in connection with the statutes relating to appeals; that the obligation assumed to pay the judgment at the end of the period of stay is to be given force only in the case that the judgment is then a valid subsisting judgment, ripe for execution, and not then super-

sed by action taken under other provisions of the statute conferring rights and privileges upon judgment debtors. The statute relating to stays, as well as the statute relating to appeals, are for the benefit of the judgment debtor, and the exercise of rights conferred upon him by the one ought not to preclude the exercise of rights conferred upon him by the other.

The cases on the question are not uniform even under similar statutes, but the prevailing rule is, we think, that the giving of the stay bond does not operate as a denial of the right of appeal. 2 Cyc. 657, n. 16. The motion is denied.

HADLEY, C. J., RUDKIN, MOUNT, ROOT, and CROW, JJ., concur.

[No. 7440. Decided July 11, 1908.]

GERMAN-AMERICAN STATE BANK, *Relator*, v. E. H.
SULLIVAN, *Judge, Respondent*.¹

APPEAL—DECISION—LAW OF CASE—MANDATE—COMPELLING ENTRY OF JUDGMENT. Where a case is remanded on appeal with directions to enter judgment in a specified amount, and no modification is requested in the appellate court, the judgment becomes the law of the case; and where the trial court is about to add interest thereto, mandamus lies to compel entry of the judgment as directed.

Application filed in the supreme court June 8, 1908, for a writ of mandate to compel the superior court for Spokane county, Sullivan, J., to enter judgment as directed in an opinion rendered on appeal. Granted.

Merritt, Oswald & Merritt, for relator.

B. C. Mosby, for respondent.

PER CURIAM.—This proceeding is an original application in this court for an order in the nature of a writ of mandate directed to the superior court of Spokane county and to

¹Reported in 96 Pac. 522.

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Opinion Per Curiam

E. H. Sullivan, a judge thereof. The application is docketed as a separate cause, but it relates to the kind of judgment that shall be entered by the superior court in cause numbered in this court 7148, and entitled, "*German-American State Bank v. Spokane-Columbia River Railroad and Navigation Company*," heretofore decided by this court and reported in 49 Wash. 359, 95 Pac. 261. Reference is hereby made to that opinion for an understanding of the controversy here.

It will be observed that the opinion closes as follows:

"There remains therefore \$2,500 more to be placed to appellant's credit. After deducting from the \$2,500, the amount the court found to be the balance upon appellant's note, judgment should go against respondent and in favor of appellant for the remainder. The judgment is reversed, and the cause remanded with instructions to enter judgment in accordance with this opinion."

The application states that, upon the return of the cause to the superior court, the above-mentioned judge announced that he will not follow literally the above directions in the opinion, but that, in entering the judgment, he will include interest not mentioned in the opinion. This application states that the court found in the other case that the balance due upon the note was \$1,904.90, which sum deducted from \$2,500 leaves \$595.10. A literal following of the direction in the former opinion calls for judgment in the last-named sum against the respondent in that case, who is the relator here. It is the view of the trial court, however, that interest should be added upon the \$595.10 from the date of the original judgment, such interest amounting to \$41.60. The directions in the opinion are, however, explicit and no mention is made of such interest item. To include interest would necessarily in effect involve a modification of the judgment here. No motion was made by the appellant who prevailed here for such modification. That cause has now been finally determined by this court, and the mandate contained in the

opinion is the law of the case. It will therefore be necessary for the trial court to enter the judgment omitting the interest item, and it is so ordered.

[No. 7217. Decided July 11, 1908.]

SEATTLE & SAN FRANCISCO RAILWAY & NAVIGATION
COMPANY, *Respondent*, v. MARYLAND CASUALTY
COMPANY, *Appellant*.¹

INSURANCE—INDEMNITY INSURANCE — LOSS SUSTAINED — PAYMENT BY NOTE. Where the assured in a liability insurance policy gave its note for the amount of a judgment obtained for personal injuries, covered by the policy, in full satisfaction thereof, a "loss is sustained" by the assured within the meaning of a provision in the policy that no action shall be maintained thereon unless brought to reimburse the assured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 4, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon an employer's liability policy. Affirmed.

Bausman & Kelleher and *R. P. Oldham*, for appellant, cited: *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N. W. 1055; *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. 842, 11 L. R. A. 689; *Western Union Telegraph Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283; *Kelly v. Supreme Council*, 46 App. Div. 79, 61 N. Y. Supp. 394; *Lockwood v. Sturdevant*, 6 Conn. 373; *Moses v. Travellers' Ins. Co.*, 63 N. J. Eq. 260, 49 Atl. 720; *Allen v. Aetna Life Ins. Co.*, 137 Fed. 136, 145 Fed. 881; *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752; *Valentine v. Wheeler*,

¹Reported in 96 Pac. 509.

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122 Mass. 566, 23 Am. Rep. 404; *Weller v. Eames*, 15 Minn. 461, 2 Am. Rep. 150.

B. S. Grosscup, for respondent.

HADLEY, C. J.—This is an action upon an employer's liability policy, which was issued by the defendant to the plaintiff. Suit was previously brought against this plaintiff by one of its employees, to recover \$50,000 damages on account of personal injuries alleged to have been caused by the neglect of the employer. Judgment was obtained in favor of the employee for \$25,000, and the plaintiff alleges that it was compelled to pay, and did pay, the amount of the judgment with interest and costs, amounting in all, on the date of the payment, to \$27,629.87. Judgment is demanded in this action for \$5,000, the limit of the defendant's liability under the terms of its policy. After a trial before the court without a jury, judgment was rendered against the defendant for the amount demanded, and it has appealed.

The appellant contends that the court erred in its findings. It was found that the respondent was compelled to pay, and that it did pay, the amount of the judgment in the sum hereinbefore stated. The appellant maintains that respondent has not paid the judgment, and that it is therefore not entitled to recover under the terms of the policy. After the judgment was obtained, the appellant refused to settle, and thereupon Currans, the holder of the judgment, sold and assigned it to the Northwestern Improvement Company for the sum of \$14,000, paid in cash therefor. Thereafter, at the instance of the insurance company, an appeal to this court was perfected, and the judgment was affirmed. After the affirmance of the judgment here, the board of trustees of respondent by resolution authorized the execution of respondent's note in the sum of \$27,629.87 to the Northwestern Improvement Company, assignee of the judgment, the sum being the amount of the judgment and interest, and the note

to be taken and accepted in satisfaction of the judgment. The note was so made and accepted, and the judgment was satisfied of record. The respondent then made demand upon appellant for the amount of the indemnity provided by the policy, and upon appellant's refusal to pay, this suit was brought to recover.

It is urged by appellant that the above facts do not establish a loss on the part of respondent, and that the policy does not provide an indemnity against mere liability, but against loss only. We will pass over a discussion of the question as to whether the policy is an indemnity against liability or not, inasmuch as a decision upon that matter does not seem to be necessary in the determination of this case. Respondent has called to our attention a very interesting New Hampshire case, *Sanders v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. 688, which holds that, under this form of policy, when the insurance company, after receiving notice of the action, comes in and defends the action against the assured, it recognizes liability and the policy then becomes an indemnity against liability. The argument in that opinion is both interesting and forcible, but it is not necessary that we shall either approve or disapprove its conclusions at this time.

Appellant concedes that the policy does provide for an indemnity against loss, but contends that there has been no loss within the meaning of the following provision of the policy, to wit:

"No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

The argument is made that there is no loss within the meaning of the above until cash has been actually paid in satisfaction of the judgment. The conveyance of property

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in satisfaction of the judgment would certainly establish a loss; at least to the extent of its value. The execution of a note in exchange for satisfaction is in legal effect equivalent to the exchange of property therefor. It confers a right to invoke legal process to seize and levy upon property in value equal to the amount of the note. This precise question under a policy identical with this one was determined adversely to appellant's contention in *Kennedy v. Fidelity & Casualty Co.*, 100 Minn. 1, 110 N. W. 97, 117 Am. St. 658, 9 L. R. A. (N. S.) 478. We quote the following pertinent language from the opinion in that case:

"But the whole argument of appellant rests upon the claim that the mere giving of the notes did not amount to a loss actually sustained, for the reason that the maker of the notes and the guarantor might never be called upon to make payment, might become insolvent, that there is no certainty they will ever be paid, and, if not paid, there is no loss actually sustained. This means that the party assured, no matter what his financial condition might be, would be compelled to raise the actual cash within sixty days and pay it to the judgment creditor, or be foreclosed from enforcing the indemnity against the company. If the position is sound, the money could not be raised by borrowing at a bank, or at any other place, upon promissory notes secured either by a signer or by property, because, before the notes became due, the property might become worthless, deteriorate in value, or the parties might become insolvent, and no actual payment ever be made; hence no loss. Fairly construed, the language means simply that the judgment must be paid and satisfied within sixty days from date of its entry, and, when such judgment is paid or satisfied, the loss is actually sustained. Of what consequence is it to the company whether respondent has on hand immediate cash to pay the judgment, or whether the judgment debtor is compelled to borrow that amount on the most favorable terms, or whether he makes the payment and secures the satisfaction by the execution of promissory notes running direct to the judgment creditor? Logically there is no difference in the method, and in either case it amounts to a payment and satisfaction of the judgment. If the assured accomplished the satisfaction and payment of the

judgment by executing and delivering the promissory notes above described, the good faith of that transaction was hardly open to question, even though it gave the assured the advantage of collecting from appellant company the amount of insurance before the notes came due."

The good faith attending the execution of the note in the case at bar is manifest from the record, and, as said in the above case, that matter is not open to question; since, by means of the note, the respondent accomplished satisfaction and payment of a valid judgment. The Minnesota case cited is also reported in 9 L. R. A. (N. S.) 478. In a note following the case as there reported is the following statement:

"The conclusion reached in the above case, that the giving of a note amounts to a loss actually sustained by the person indemnified within the meaning of a contract of indemnity, where the note is accepted by the creditor as actual payment and satisfaction of the original debt, has the sanction of all the authorities."

In support of the statement the following authorities are cited in the note, all of which we have examined and find to be in point: *Bausman v. Credit Guarantee Co.*, 47 Minn. 377, 50 N. W. 496; *Lee v. Clark*, 1 Hill (N. Y.) 56; *Wilson v. Smith*, 23 Iowa 252; *Gardner v. Cooper*, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540; *Pasewalk v. Bollman*, 29 Neb. 519, 45 N. W. 780, 26 Am. St. 399; *Flannagan v. Forrest*, 94 Ga. 685, 21 S. E. 712.

Appellant insists that the maker of the note may be insolvent or that the note may be compromised or settled for a sum less than the indemnity liability in the policy. These matters are held to be immaterial in some of the cases cited. We therefore hold that, within just principles and by eminent authority, the execution and acceptance of respondent's note in satisfaction of the judgment established a loss, and that this action may be maintained upon the provisions of the policy indemnifying against loss.

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Other questions suggested by appellant are involved in what has been hereinbefore said, and further discussion is not necessary. The judgment is affirmed.

FULLERTON, RUDKIN, DUNBAR, and CROW, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 7286. Decided July 11, 1908.]

THEODORE ILES, *as Administrator of the Estate of Otis A. Kern, Deceased, Respondent*, v. MUTUAL RESERVE LIFE INSURANCE COMPANY, *Appellant*.¹

INSURANCE—CONDITIONS—FORFEITURE—NONPAYMENT OF PREMIUM—WAIVER. A life insurance policy is rendered null and void, *ipso facto*, by failure to pay at maturity a note given in payment of the first year's premium, where the receipt therefor and the policy contained that express condition; and the company is not estopped to assert the forfeiture of the policy by the fact that it placed the note in the hands of an attorney for collection and endeavored without success to collect the note after its maturity and before the death of the assured, where the policy provided that no waiver of forfeiture should be valid unless in writing and signed by an officer of the company.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 1, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a policy of life insurance. Reversed.

Parsons & Parsons, for appellant.

Hathaway & Alston, for respondent.

HADLEY, C. J.—This is an action to recover upon a life insurance policy. The suit was brought by the administrator of the estate of the assured. The policy was for \$1,000, and

¹Reported in 96 Pac. 522.

the first year's premium was not paid in cash, but the assured gave his promissory note for \$23.41, due three months from its date. The note was not paid at maturity and has never been paid. The assured died eight months after the date of the policy and five months after the maturity of the note. At the time the note was taken and the policy delivered, the defendant gave to the insured a receipt in writing, which the latter accepted, and it contained the following condition:

"If a note is given in payment of any part of the premium receipt of which is hereinabove acknowledged, and if said note be not paid at its maturity, it is understood and agreed that the policy shall then be *ipso facto* null and void."

The policy itself also contained an equivalent provision with respect to the effect of nonpayment of any premium installment when due. After the maturity of the note, and after the defendant had knowledge of the default in payment, it placed the note in the hands of an attorney for collection, and efforts were made in behalf of the defendant to collect from the assured the amount of the note, but he still failed to pay. The cause was tried before the court without a jury, and the court concluded from the facts that the defendant, by its action in endeavoring to collect the amount of the note after its maturity, waived its right to declare a forfeiture of the policy, and that it is now estopped to deny that the policy was in full force when the insured died. Judgment was awarded to the plaintiff, and the defendant has appealed.

Assuming that the policy was in full force during the three months' credit period extended by reason of the note, it is, however, true that the assured did not die during that period. He died five months after the credit period had expired. Under the terms of the contract, the policy undoubtedly became null and void upon default in payment of the note at maturity. That proposition seems to be so elementary that discussion of it appears unnecessary. The policy having become void by reason of the negligent act of the insured to

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pay the note, was it afterwards revived by the act of the appellant in merely seeking to effect payment? Was that conduct of appellant's sufficient of itself to waive the forfeiture that had already been effected in law? The policy contained the following provision:

"No contract, alteration or discharge of contract, waiver of forfeiture, or granting of permits or credits, shall be valid unless the same shall be in writing, signed by the president or vice president and one other officer of the company."

Under the above provision, it is plain that the forfeiture could not ordinarily be waived except in the manner stated. To be sure, if the money had been actually paid after forfeiture and its benefits had been accepted and retained by the appellant, a different question would have arisen. But nothing was done except to ask the insured to pay, which amounted to a mere offer to revive the policy if he should pay. To say that the mere offer to revive the policy, on condition of payment being made, operated to waive the forfeiture provision in the policy, notwithstanding the fact that payment was not made and the assured did nothing and assumed no liability which changed his situation, would, we think, do violence to elementary principles of fairness between men. Waiver as applied to the facts of this case is identical with estoppel.

In *Hughes v. New York Life Ins. Co.*, 32 Wash. 1, 72 Pac. 452, we said of estoppel as follows:

"The doctrine of estoppel is of equitable origin, and is founded upon principles of equity and justice. It is applied to conclude a party who, by his acts or admissions, has influenced the conduct of another only when in good conscience and honest dealing he ought not to be permitted to gainsay them."

Again, in *Elhart v. Pacific Mutual Life Ins. Co.*, 47 Wash. 659, 92 Pac. 419, this court, speaking of waiver, said:

"Ordinarily a waiver is an intentional release of some right, and it is generally held that provisions of this char-

acter in insurance policies are deemed to be waived only when an intention to waive is apparent, or where the conduct of the company is inconsistent with an intention to declare a forfeiture, or has placed the other party at a disadvantage, or gained for itself an advantage which it should not in justice and good conscience be permitted to assert."

In what way did the acts of appellant here influence the conduct of the deceased so as to mislead him or put him at a disadvantage? The argument is made that the demand for payment lulled him into the belief that the forfeiture was waived and that the policy was thereby reinstated and in force. To say that appellant should be estopped for such a consideration would, in our view, be to base the estoppel upon an element not sounding in good morals, whereas estoppel is always founded upon principles of equity and good conscience. If the insured contented himself with the belief that the mere demand for payment after maturity without any action upon his part revived his policy which had been forfeited by his own neglect, then he must have also rested secure in the belief that, no matter for how long a time he continued to refuse payment, his insurance would nevertheless be indefinitely prolonged. He had neither legal nor moral right to allow himself to be lulled into any such belief, and inasmuch as he in no way acted upon the demand for payment, his position was in law in no way changed thereby.

Respondent insists that the decision of this court in *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 84 Pac. 412, is decisive of this case in his favor. We find that the facts of the two cases are very dissimilar. In the case cited the policy provided for monthly payments in advance. For a number of months the company accepted, without objection, payments at any time during the month. In some instances payments were not made until the last day of the month. These repeated acts established such a custom and course of dealing as admitted of no other construction than that it was the intention to waive the terms of the contract re-

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quiring advance payments. The insured relied thereon and continued to make payments which were accepted, greatly to her prejudice if the company should have afterwards been permitted to say that the provision as to payments in advance had not been waived. We have seen that the insured in the case at bar was in no way put to a disadvantage by any act of appellant's, and the former case is therefore not an authority for holding that there was a waiver here.

Respondent also cites *Stewart v. Union Mut. Life Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147. The defense there was that the contract never became effective for the reason that the agent had no authority to grant credit for premiums. A note was taken for premium and, after its maturity, the insured gave his check on the bank to the agent. But the check was returned "not good." Correspondence ensued between the agent and assured with reference to providing for the cashing of the check, the letter suggesting that the assured attend to the matter "next week." The next day after this letter was written the assured died. The court held that the contract as made by the agent was ratified by the company, the credit being permitted, and that what occurred about the check amounted to an extension of the credit period. The insured died during that extension period, and the company was held. The court held that the credit period was extended by reason of the fact that the assured was definitely given until the next week to pay, and was not notified of any intention to insist upon a forfeiture. He was thus led to act upon a definite extension of credit, much to his disadvantage if the company could afterwards insist upon a forfeiture. The element of estoppel therefore clearly existed in the case. There was no definite or any extension of credit in the case at bar, but a mere offer in legal effect to reinstate a forfeited policy if payment should be made.

The case of *Hollis v. State Ins. Co.*, 65 Iowa 454, 21 N. W. 774, is also cited by respondent. That case involved a

fire insurance policy, and after the acts of the assured had had the effect to render the policy void, the company knowingly continued to treat the contract as of binding force, and thereby induced the insured to incur expense in that belief. The assured was placed at a disadvantage and his situation was changed, resulting directly from the act of the insurer; thus clearly introducing the element of estoppel.

Respondent cites three Kentucky cases, as follows: *Moreland v. Union Cent. Life Ins. Co.*, 104 Ky. 129, 46 S. W. 516; *Union Cent. Life Ins. Co. v. Duvall*, 20 Ky. Law 441, 46 S. W. 518, and *Union Cent. Life Ins. Co. v. Spinks*, (Ky.), 69 L. R. A. 264. If the Kentucky cases should be fully accepted as authority in the premises, then probably respondent has room for argument therefrom in favor of affirming this judgment. Appellant, however, insists that the Kentucky court has gone far in its attempt to apply the principles of waiver and estoppel in insurance cases. It may have gone further than we feel justified in going under our views of the fundamental principles governing estoppel as hereinbefore discussed and as heretofore expressed in other cases. However, while some of the facts of the Kentucky cases cited may be said to approach very nearly to those now under consideration, yet each case may be distinguished from this one by a close application of the principles of estoppel. The *Moreland* case was decided first, and the opinion in the *Duvall* case was filed on the day following, the court being divided in each case. The *Spinks* case was decided later, the court being again divided. The *Moreland* case probably approaches this in similarity more fully than either of the others, and yet the opinion states that, by the attempt of the company to collect, the assured was put to trouble and expense, thereby effecting at least some change in his situation, which is lacking as an element of estoppel in the case at bar. In the *Duvall* case the offer to waive was accepted and remittance was made four days after maturity of the note. The

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Syllabus.

amount was received and was retained by the company until it learned of the sickness or death of the insured, which occurred meanwhile, and then the money was returned. Clearly the company was estopped to deny waiver under such circumstances. In the *Spinks* case the insured had been in the habit of giving notes for his premiums and paying the same some time after maturity. The payments were always accepted without question. By custom a course of dealing was established between the two upon which the insured had a right to rely until he was notified to the contrary, and thus the company was estopped to deny a waiver. It will therefore be seen that each case cited contains some fact giving rise to estoppel which does not exist in the case at bar.

For the reasons stated, the judgment is reversed, and the cause remanded with instructions to dismiss the action.

FULLERTON, RUDKIN, MOUNT, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 7066. Decided July 14, 1908.]

ELLA ARCHIBALD, as *Administratrix of the Estate of*
John R. Archibald, Deceased, Appellant, v.
LINCOLN COUNTY, *Respondent*.¹

DEATH—ACTION FOR—PARTIES ENTITLED TO SUE—PLEADING. An action for wrongful death may be prosecuted in the name of the administratrix of the deceased's estate, although it is not alleged that it is for the benefit of the widow and children, where they are named in the complaint; as the action will inure to their benefit by operation of law.

COSTS—REMEDIES FOR COLLECTION—ACTIONS—ABATEMENT—FORMER ACTION FOR COSTS—STAY OF PROCEEDINGS—ABUSE OF DISCRETION. Where a widow brought suit against a county in her own name for the wrongful death of her husband, and upon submitting to a voluntary nonsuit, judgment for \$264 costs was entered against her, it is an abuse of discretion, upon the commencement of a suit by her as administratrix for the benefit of the widow and children, to stay

¹Reported in 96 Pac. 831.

proceedings as to the widow's claim until the costs of the former action were paid, where it appears that she is without means, has three small children to support, that she and the children had been ill, dependent upon charity, and inmates of the county poor farm, and no additional costs would accrue to the county by reason of the inclusion of the widow's claim.

HIGHWAYS — DEFECTS — EVIDENCE OF NEGLIGENCE — SUFFICIENCY. There is sufficient evidence to show that a highway was not in a reasonably safe condition for public travel where it appears that there was a narrow grade or fill, eight or ten rods long, seven or eight feet wide at the top, and four or five feet high, that there was a bridge near the center of the fill, from one end of which the earth had settled away leaving an abrupt rise of six inches, and that on driving six inches or a foot from the wagon track one would be precipitated over the bluff.

SAME—DEFECTS—NOTICE TO COUNTY. Where a highway was dangerous by reason of a narrow fill, and it had been in such condition for some years, the county has both actual and constructive notice of the defect.

SAME — CONTRIBUTORY NEGLIGENCE OF TRAVELER — QUESTION FOR JURY. It is for the jury to determine whether the deceased was guilty of contributory negligence in attempting to drive home with a load of lumber on a dark night, over a narrow fill or grade only a foot or two wider than the wagon tracks, having a defective approach to a bridge, of all of which he had knowledge, where it appears that the highway had been in constant use by the public up to the day of the accident, and that deceased had no choice of routes (MOUNT, J., dissenting).

DEATH—DAMAGES—EVIDENCE—SUFFICIENCY. In an action for wrongful death, prosecuted for the benefit of deceased's widow and children, evidence of the age of deceased, his life expectancy, and his earning capacity, is sufficient to enable the jury to assess the damages.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered May 24, 1907, granting a nonsuit at the close of plaintiff's case, after a trial before the court and a jury, dismissing an action to recover for wrongful death caused by a defective highway. Reversed.

A. J. Grant, J. T. Mulligan, and Martin & Wilson, for appellant.

C. A. Pettijohn, for respondent.

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Opinion Per RUDKIN, J.

RUDKIN, J.—On the 27th day of January, 1905, John R. Archibald met his death from the overturning of his wagon, while driving along a narrow grade on one of the public highways of Lincoln county. He left surviving him a widow and three minor children. On the 10th day of April, 1906, the widow commenced an action against the county in her own name and in her own right to recover damages for the death of the husband, caused by the wrongful act of the county in failing to keep the public highway in a reasonably safe condition for public travel. Issue was joined on the complaint, and on the 21st day of December, 1906, the plaintiff submitted to a voluntary nonsuit. The judgment of nonsuit awarded costs against her in the sum of \$264.05. Soon after the dismissal of this action, a second action was commenced against the county for the same tort, in the name of the widow in her own right and as administratrix of the estate of her deceased husband, and in the names of the minor children by the widow as their general guardian. On the 26th day of February, 1907, the court, on motion of the defendant, entered an order staying further proceedings in the second action as to the individual claim of widow until the costs awarded against her in the former action were paid. A demurrer was thereafter interposed to the complaint of the plaintiffs other than the widow, and the demurrer was sustained. An amended complaint was then filed in behalf of the widow as administratrix of the estate of her deceased husband, omitting the names of the children and the name of the widow as guardian and in her own right. On the 9th day of April, 1907, a second order staying proceedings as to the individual claim of the widow was entered. Issue was thereupon joined on the last amended complaint, and a trial was had before a jury. At the close of the plaintiff's case a nonsuit was granted, and from the judgment of nonsuit, this appeal is prosecuted.

Before passing to the question of negligence on the part of the county and contributory negligence on the part of the

deceased, we will dispose of certain preliminary questions raised by the parties. The respondent contends that the amended complaint on which the case was finally tried failed to state a cause of action, because the action was prosecuted in the name of the personal representative for the benefit of the estate. While it is customary to prosecute such actions as this in the names of the widow and children, they may likewise be prosecuted in the name of the personal representative for the benefit of the widow and children. *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333. The complaint in this case does not allege that the action is prosecuted for the benefit of the widow and children, but they are named in the complaint and any recovery will inure to their benefit by operation of law. The complaint is therefore sufficient.

The appellant contends that the court erred in staying proceedings as to the widow's claim until the costs of the former action instituted by her were paid. Courts doubtless possess inherent power to make such orders as the one complained of, in the exercise of a sound judicial discretion, and this much the appellant concedes. But in this particular case, it appears from the showing made that the widow is absolutely without means; that she has three small children to support by her personal earnings; that she and the children have been ill, and are in a large measure dependent upon the charity of friends, and that for a time at least they have been inmates of the Lincoln county poor farm. Under such circumstances, if the widow has a meritorious claim against the county, we think the court abused the discretion vested in it by law, especially in view of the fact that the action must proceed in any event for the benefit of the children, and no additional costs will accrue against the county by reason of the inclusion of the widow's claim. The stay order should therefore be vacated.

This brings us to the question of negligence on the part of the county in failing to keep the highway in repair. The

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Opinion Per RUDKIN, J.

testimony shows that there was a narrow grade or fill, eight or ten rods in length, on the county road leading from the Archibald home to the town of Downs. This grade or fill was four or five feet higher than the surrounding country, and seven or eight feet in width at the top. There was a bridge about the center of the fill, constructed of planks eighteen feet in length, so that the end of the planking extended several feet beyond the grade at either side. The earth had settled away from the bridge on the side toward the town of Downs, so that there was an abrupt raise of about six inches as one struck the bridge. It was conceded by all the witnesses that the grade extended little more than a foot beyond the wagon track on either side, and one witness testified that if you got six inches out of the track you would be precipitated over the bluff. There was no eyewitness to the accident. It appears that the deceased was returning from the town of Downs with a load of lumber, and as the wagon struck the bridge the load went over the embankment. The deceased was caught beneath the load and killed. It does not appear from the record at what hour the deceased met his death, but the night was dark, and it would seem from the tracks discovered the next morning that he left his wagon above the grade and walked down to the bridge before attempting to cross. There can be no question but that this testimony tends very strongly to show that the highway was not in a reasonably safe condition for public travel. Indeed the burden of the respondent's argument is that the deceased was guilty of contributory negligence in attempting to pass over the grade in its then condition, and this would seem to be a concession on its part that the highway was defective and out of repair. It is said, however, that there was no proof that the county had notice of the defective condition of the highway. The defect was largely one of original construction, and furthermore, the proof shows that it remained in substantially the same condition for some years before the

accident. Here was proof of both actual and constructive notice.

Was the deceased guilty of contributory negligence as a matter of law?

"Knowledge by a person of a defective or dangerous condition of a public highway, and the use of it notwithstanding such knowledge, are not of themselves negligence. If the necessities of a person's business require him to use a defective or dangerous highway, he may use it, notwithstanding he knows its defects and dangers. Such knowledge only requires an increased caution and diligence to avoid injury. In other words, although a person is required to exercise only ordinary care and prudence, yet such care and prudence must be commensurate with the necessities of the case, and maintain a constant level with the dangers of the situation.

"A person, although entitled to the use of a public highway, and entitled to do so although he knows its defective character, cannot do so in the face of certain danger.

"If the judgment of an ordinarily prudent and reasonable person would teach him that danger was certain and unavoidable, he cannot insist on rushing into it, merely because the law gives him the right to use the public highway, and requires the township officers to keep it in repair."

These instructions were approved by the court in *Falls Township v. Stewart*, 3 Kan. App. 403, 42 Pac. 926, and embody, in our opinion, a correct statement of the law. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Reed v. Spokane*, 21 Wash. 218, 57 Pac. 803; *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122.

Applying these rules to the facts in the case at bar, it appears that the highway had been in constant use by the general public up to the very day of the accident. The deceased was returning to his home with a load of lumber. He had no choice of routes. He was compelled to pass over the highway, leave his load behind, or remain away over night. Under such circumstances, we think the negligence of the deceased, or what a reasonably careful and prudent person

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would have done under the circumstances, was peculiarly a question for the jury.

It is lastly contended that there was no proof of damages. The testimony showed the age of the deceased, his life expectancy, and his earning capacity. This was ample to enable the jury to assess the damages. On consideration of the entire record, we are satisfied that the court erred in staying proceedings as to the claim of the widow and in directing a nonsuit, and for these errors the judgment is reversed and a new trial ordered.

HADLEY, C. J., and FULLERTON, J., concur.

Root, J.—I concur in the result, but do not approve the instruction quoted from *Falls Township v. Stewart*.

MOUNT, J. (dissenting).—The deceased knew the danger and voluntarily took the chances of safely passing. I think the court properly granted the nonsuit, and that the judgment should be affirmed, and I therefore dissent.

DUNBAR and CROW, JJ., took no part.

[No. 7288. Decided July 15, 1908.]

THE GILBERT COMPANY, *Appellant*, v. EARL W. HUSTED,
Respondent.¹

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY—VALUE OF PROPERTY CLAIMED. In an action to recover personal property, and damages for its detention, under the claim and delivery statute, where the value of the property is not found by the court or jury, the test of the jurisdiction of the appellate court is the value alleged in the complaint, if the demand appears to have been made in good faith.

SAME—DETERMINATION OF AMOUNT—EX PARTE AFFIDAVITS—RECORD. The jurisdiction of the supreme court on appeal in replevin cannot be determined by *ex parte* affidavits as to the value of the property; and if the value is not found by the court or jury, and the complaint and the only evidence on the subject show the value to be over \$200, the supreme court has jurisdiction.

¹Reported in 96 Pac. 835.

APPEAL—NOTICE OF APPEAL—SUFFICIENCY. A notice of appeal sufficiently describes the judgment by reference to the "decision" entered on a certain date, the record showing the judgment to have been entered on such date.

SAME—BOND—SUPERSEDEAS—AMOUNT OF BOND. Where, in an action of replevin, the appellant having erroneously assumed that it had possession of the property, the court on application fixed the amount of the supersedeas bond in the sum of \$....., a bond given in the sum of \$1,000 both as a cost and supersedeas bond is sufficient to give jurisdiction of the appeal, where the only judgment to be superseded was one for \$43 in the registry of the court and for costs taxed.

SET-OFF AND COUNTERCLAIM—CAUSES ARISING FROM SAME TRANSACTION—REPLEVIN. In an action of replevin for goods sold under a conditional bill of sale, the vendee may counterclaim for damages by reason of the vendor's breach of a contemporaneous agreement respecting the mode of payment, since the two contracts arise out of the same transaction.

CONTRACTS—VALIDITY—CONDITION LIMITING POWER TO CONTRACT. The vendor in a conditional sale cannot limit his power to make other written contracts respecting the payments, by a memorandum in the bill of sale to the effect that the vendor shall not be responsible for any written or verbal contract or promise other than written or granted on the face of the contract.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—CONTRACTS—AMBIGUITY. Where a written contract provides that the vendor in a conditional sale of a piano will transfer to the vendee its moving contract until one-half of the payments are made, it is free from ambiguity, and parol evidence is inadmissible to show that the transfer was to continue for ten months, or that only the profits arising from the moving contract were to be applied on the purchase price of the piano.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered November 30, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action of replevin. Reversed.

Larrabee & Wright, for appellant.

Sherwood & Mansfield and *Hulbert & Husted*, for respondent.

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Opinion Per RUDKIN, J.

RUDKIN, J.—On the 3d day of July, 1908, the Allen & Gilbert-Ramaker Co. entered into a conditional sale agreement with the defendant Husted for the sale of a piano. The purchase price of \$325 was made payable as follows: \$25 on the execution of the contract of sale, and \$15 on the 3d day of each and every month thereafter until the purchase price with interest at the rate of 8 per cent per annum, was fully paid. Title was to remain in the seller until the full payment of the purchase price. At the same time, and as a part of the same transaction, the parties to the conditional sale agreement entered into the following additional or supplemental agreement:

“It is hereby agreed by and between Allen & Gilbert-Ramaker Co., parties of the first part, and Earl W. Husted, party of the second part, that the first party, for and in consideration of the sale of a piano mentioned in a certain conditional sale of even date herewith, will transfer its moving account to the party of the second part until one-half of the said purchase price of three hundred twenty-five (\$325) dollars is paid, provided the party of the second part furnishes first-class work and at schedule prices.”

At the time of the commencement of this action, the sum of \$250 had been paid on the purchase price, and the defendant was in default for the balance due. The action was instituted by the plaintiff, as successor in interest of the Allen & Gilbert-Ramaker Co., to recover possession of the piano and damages for its detention, under the claim and delivery statute. The answer admitted the execution of the memorandum of conditional sale, and that only \$250 had been paid on the purchase price, and alleged affirmatively that it was agreed by and between the parties that \$175 of the purchase price should be paid in cash, and that the balance should be paid out of *the profits* arising from the moving contract above referred to; that the profits arising from the moving contract would amount to from \$15 to \$25 per month; that it was agreed that the contract should remain in force for a period

of *ten months*; that the Allen & Gilbert-Ramaker Co. breached the moving contract on November 1, 1903, and transferred the moving contract to another; that the defendant was damaged in the sum of \$90 by the breach of the moving contract, and had tendered the sum of \$75 to the plaintiff in full payment and satisfaction of the balance due. On the issues presented by the complaint and affirmative answer, the case was brought on for trial. The court found in substance, that the defendant had paid \$250 on the purchase price of the piano; that he had tendered and deposited in court the sum of \$75 in full payment and satisfaction of the balance due; that he had been damaged in the sum of \$90 by reason of the breach of the moving contract, and entered judgment decreeing that the defendant was the owner of the piano, free and clear of all encumbrance, and awarding him the sum of \$43 from the tender deposited in court, together with costs of suit. From this judgment, the plaintiff has appealed.

The respondent has moved to dismiss the appeal on the ground that the value of the property in controversy is not sufficient to bring the case within the appellate jurisdiction of this court, and because the notice of appeal and appeal bond are defective. In actions of this kind the jurisdictional question is ordinarily determined by the actual value of the property, and not by the value as alleged in the complaint. *Herrin v. Pugh*, 9 Wash. 637, 38 Pac. 213; *Graves v. Thompson*, 35 Wash. 282, 77 Pac. 384. The value in such cases is that found by the court or jury. *Herrin v. Pugh*, *supra*. But where judgment goes for the defendant, there is no finding by the court or jury on the question of value, and in such cases the value alleged in the complaint is the test of jurisdiction, subject to the qualification that the demand shall appear to have been made in good faith for such amount. *Burkhardt v. Elgee*, 93 Wis. 29, 66 N. W. 525, 1137; *Gorman v. Havird*, 141 U. S. 206, 11 Sup. Ct. 943, 35

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L. Ed. 717, and cases cited. If the rule were otherwise, a plaintiff dismissed without trial could never obtain a review of his case in this court. But if we are in error in this, we would still be compelled to look to the entire record to ascertain the jurisdictional facts, and could not consider *ex parte* affidavits filed in this court. *Gray v. Blanchard*, 97 U. S. 564, 24 L. Ed. 1108; *Knapp v. Deyo*, 108 N. Y. 518, 15 N. E. 540. A reference to the record shows that the only evidence offered on the question of value was that of the appellant, showing the value to be \$325.

The notice of appeal was as follows:

"You and each of you will please take notice that the plaintiff in this action, feeling himself aggrieved on account of the decision entered herein on the 30th day of November, 1907, does here and now appeal from the same and each and every part thereof unto the supreme court of the state of Washington."

The record shows that the judgment was entered on the date mentioned in the notice, and the notice sufficiently describes the judgment. *Roberts v. Shelton Southwestern R. Co.*, 21 Wash. 427, 58 Pac. 576; *Brown v. Calloway*, 34 Wash. 175, 75 Pac. 630; *James v. James*, 35 Wash. 650, 77 Pac. 1080; *Horrell v. California, Oregon & Wash. Home-builders' Ass'n*, 40 Wash. 531, 82 Pac. 889.

At the time the appeal was taken the appellant's counsel erroneously assumed that the appellant had possession of the piano, and applied to the court to fix the amount of a supersedeas bond. An order was entered fixing the amount of the bond in the sum of \$., and thereafter a bond in the sum of \$1,000, conditioned both as a cost and a supersedeas bond, was filed. It appears from the record that the piano was in the possession of the respondent, and that the only judgment to be superseded was the judgment for \$43 in the registry of the court, and for costs of suit to be taxed. The bond of \$1,000 was amply sufficient to supersede this judg-

ment and secure the costs on appeal. The motion to dismiss the appeal must therefore be denied.

On the merits of the case, it is first contended that a counterclaim for damages arising from a breach of the moving contract could not be interposed in this form of action. The two contracts formed a part of the same transaction and must be construed together. In *Ames Iron Works v. Rea*, 56 Ark. 450, 19 S. W. 1063, it was held that in an action of replevin to recover goods sold, with reservation of title in the vendor until the purchase price was paid, the vendee may in defense, counterclaim the damages sustained on account of the vendor's failure to deliver the goods at the time agreed, and tender to the vendor the balance due on the purchase price after deducting such damages, and this rule meets our approval. If the failure of the purchaser to make payment in this case was caused by the refusal of the vendor to permit him to make payment in the mode specified in the contract, it certainly cannot be contended that the vendor can recover the property, notwithstanding his own breach of contract and default.

It is next contended that the court erred in admitting the moving contract in evidence, because the memorandum of conditional sale contained the following provision: "The Allen & Gilbert-Ramaker Co. is not responsible for any written or verbal contract or promise, other than written or printed on the face of this contract." The proposition that a party may by contract limit his power to make other or different contracts in the future, in relation to the same or any other subject-matter, is so devoid of merit that we will not discuss it.

It is lastly contended that the court erred in admitting testimony tending to vary and contradict the terms of the moving contract. This contention must be sustained. The moving contract was written by the respondent himself and is free from ambiguity. There is certainly nothing on the face

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of the contract tending to show that it should continue in force for ten months or any other given period of time, or that only the profits arising from the contract should be applied on the purchase price of the piano. On the other hand, it seems clear that the contract should continue and remain in force only until the moving account at schedule rates should equal one-half of the purchase price of the piano, or the sum of \$162.50. It seems to us that the contract admits of no other construction, and that the proof offered and received was utterly incompetent. There was no claim or pretense that the moving contract was violated by the appellant or its predecessor in interest, as thus construed, and in our opinion no breach of the contract was shown.

The judgment of the court below must therefore be reversed. If the respondent shall pay the balance due on the purchase price of the piano, with interest and all costs awarded against him, within thirty days from the filing of the remittitur in the court below, the action will be dismissed. Otherwise the court must enter judgment for the return of the piano or its value, and assess damages for the detention, taking further proof for that purpose.

HADLEY, C. J., FULLERTON, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7216. Decided July 16, 1908.]

CLARA RANCIPHER, *Respondent*, v. WOMEN OF WOODCRAFT,
Appellant.¹

INSURANCE—MUTUAL BENEFIT INSURANCE—LAWS OF ORDER—CONSTRUCTION—DELIVERY OF CERTIFICATE—INSURANCE WHEN EFFECTIVE. A member of a beneficial association in good standing having a benefit certificate for less than \$2,000 has a right to an increase of her certificate, as a matter of right, after passing the medical examination with approval and complying with the laws of the order, where the laws provide that such a member can be permitted to increase her certificate by making application, surrendering the old certificate, being examined by the local physician and that the new certificate shall be issued if the application is approved by the grand physician, and where the by-laws did not reserve any discretion in the officers to withhold the new certificate; hence the new insurance is effective although the member died before delivery of the new certificate therefor (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered August 3, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a benefit insurance certificate. Affirmed.

Govnor Teats (Robert G. Morrow, of counsel), for appellant.

Ralph Woods and *Boyle, Warburton, Quick & Brockway*, for respondent.

MOUNT, J.—The appellant is an incorporated fraternal and beneficiary society on the lodge plan. Its headquarters were located at Leadville, Colorado. One of its local lodges, known as "Palm Circle No. 66," was located at Seattle in this state. In 1901, Minnie Sullivan became a member of Palm Circle, and took a certificate of insurance for \$1,000 in the order. Her daughter, Annie Sullivan, was named

¹Reported in 96 Pac. 829.

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therein as beneficiary. The laws of the society provided, at § 116, as follows:

"Any member in good standing, having a benefit certificate for less than \$2,000, who may desire to increase the amount of benefit, can be permitted to do so, subject to the following conditions, and not otherwise: He or she shall surrender his or her old certificate, sign a new membership application for the total amount of the benefits desired, be examined by Circle Physician, pay Circle Physician's fee, and pay to the Circle Clerk \$1. His or her old certificate and his or her application, together with draft or money order payable to the Grand Banker, shall be forwarded by the Clerk of the Circle to the Grand Clerk. The Circle Physician's report shall be sent to the Grand Physician. If his or her application is approved by the Grand Physician, a new certificate shall be issued, but in no case shall the \$1 be returned."

On November 23, 1903, Minnie Sullivan determined to exercise her right to increase the amount of her benefits from \$1,000 to \$2,000, and to make her two daughters, Annie Sullivan and Clara Rancipher, beneficiaries therein, each for \$1,000. She applied to the clerk of Palm Circle, and received a blank application, which was properly executed, and which described the desired change. She was thereupon examined by the local physician. This examination was satisfactory, and the same was afterwards approved by the Grand Physician. The head clerk on December 5, 1903, received the application at Leadville, Colorado, as approved by the Grand Physician. The original certificate did not accompany the application for increase, and the head clerk thereupon requested the clerk of Palm Circle at Seattle to forward the original certificate to him, which was done, and the original certificate reached the head clerk on December 29, 1903. Thereupon, in the regular course of business, on January 1, 1904, a new certificate as applied for was issued to Minnie Sullivan for \$2,000 which, if valid, was good for \$1,500 in case of death within one year. The new certificate was then placed with certain clerks to be registered before it was for-

warded. Before the new certificate had been forwarded from the office of the head clerk at Leadville, Colorado, that office received the following letter from the clerk of Palm Circle, Seattle:

"Seattle, Washington, January 5, 1903.

"Mr. J. L. Wright. "

"Esteemed Neighbor:—Minnie Sullivan applied for a raise in her policy. I had no idea it would be granted. She has been almost dead for the past year. How any physician could pass her I can't tell. I do not want to get mixed up in it, but she is very sick again and the Managers home thought I should write you. I do not know who examined her, and I would rather not be brought into it, if possible.

"Faternally yours, Josephine McLaughlin, Clerk."

On receipt of this letter, the head clerk held the certificate for further investigation, and before anything further was done, Minnie Sullivan died on January 10, 1904. The association afterwards paid \$1,000 to the guardian of Annie Sullivan, the beneficiary named in the original certificate, but refused to pay or recognize the claim of Clara Rancipher under the new certificate. This action was thereupon brought on the new certificate, and resulted in a judgment in favor of the respondent for \$750, from which judgment this appeal is prosecuted.

The principal question in the case is whether the contract of insurance was complete without an actual delivery of the new certificate to Minnie Sullivan. It is conceded that this certificate was not delivered, and that the appellant held the same for investigation. The trial court found that the certificate was "improperly retained by the Grand Clerk and the officers of the association at Leadville." Appellant argues that this finding is contrary to the evidence, which shows that the certificate was retained for the purpose of investigating the charge that the insured was not at that time entitled to increased insurance. The correctness of this finding depends upon whether the association might reject the application in

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its discretion. If so, then the increased insurance did not become valid until a delivery of the contract. But if the insured was entitled to an increase of her certificate as a matter of right, after having passed the medical examination and complied with the laws of the order, then there was no discretion in the executive officers of the order, and the contract was complete without the actual delivery of the new certificate. It will, therefore, be necessary to consider only whether Mrs. Sullivan was entitled to the new certificate as a matter of right.

Section 116 of the laws of the order above quoted provides that any member in good standing, having a benefit certificate for less than \$2,000, can be permitted to increase such certificate, by making application therefor, surrendering the old certificate, being examined by the Circle Physician, paying his fee, and paying a fee of \$1 to the Circle Clerk. "If his or her application is approved by the Grand Physician, a new certificate shall be issued." All these requirements were complied with. This provision is plain and direct. It contains no reservation of discretion, and the approval of the Grand Physician seems to fix the status of the applicant and of the contract. The issuance of the certificate thereafter is a mere ministerial matter. No provision in the laws of the order is called to our attention wherein any discretion is reserved in such cases. It is true that § 40, in defining the powers and duties of the Grand Guardian, who is the principal executive officer of the order, provides that "prior to actual introduction to benefit membership, he or she shall have power to summarily reject any applicant for membership in any circle at his or her discretion, even though such applicant be approved by the Grand Physician." But this power is limited by express terms so that it does not apply to this case, because Mrs. Sullivan had already been actually introduced to benefit membership. It is also true that § 115 of the laws of the order relating to a change of beneficiaries,

after defining the steps necessary to secure such change, provides that the Grand Clerk "shall thereupon prepare and cause to be signed a new benefit certificate as requested and forward the same to the Circle Clerk for delivery to the member." While this provision requires a delivery of the policy to the member, it does not, either in terms or impliedly, make such delivery a condition of liability on the contract, and under § 40, *supra*, the Grand Guardian could not summarily refuse to make delivery of the changed certificate. *Luhrs v. Luhrs*, 123 N. Y. 367, 20 Am. St. 754, 9 L. R. A. 534. If Mrs. Sullivan had lived she could have compelled the delivery of the certificate to her, because she had complied with all the laws of the order and had done all that she was required to do. Her right to increase was a contractual and beneficial right. The contract was fully completed as between her and the order. *Sanborn v. Black*, 67 N. H. 537, 35 Atl. 942; *Sourwine v. Supreme Lodge, K. of P.*, 12 Ind. App. 447, 40 N. E. 646.

The appellant could avoid the contract only by some breach of condition by Mrs. Sullivan after it was issued, or for fraud on her part in procuring the same. Fraud was alleged as one of the defenses, but there was no proof to support that defense. It was substantially abandoned, and appellant now relies wholly on the fact that the certificate was not delivered and is therefore of no effect. We are of the opinion that, under the provisions of § 116 above quoted, where delivery of the certificate is not made a condition of the contract and where no right is reserved to summarily reject the application, the contract was valid without delivery. In the case of *Logsdon v. Supreme Lodge etc.*, 34 Wash. 666, 76 Pac. 292, we said:

"A certificate cannot be said to be *issued* when it is merely dated and signed by the appellant's officers. It is not issued until it becomes vitalized as the evidence of a binding mutual obligation. It does not become such until it has been delivered to, and accepted by, the member. In that particular

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it is analogous to a deed, which does not become a deed until it is delivered, even though that may be long after its date."

That was a case where the member was a new member, and where there was a discretion which could be exercised, and where there was no actual existing contract between the parties. In this case, contractual rights already existed which it was the duty of the appellant to carry out, and no right was reserved for the exercise of a discretion to reject the application summarily.

It follows that the judgment must be affirmed, and it is so ordered.

HADLEY, C. J., RUDKIN, and ROOT, JJ., concur.

FULLERTON, J., dissents.

[No. 7229. Decided July 16, 1908.]

H. E. NOBLE *et al.*, *Respondents*, v. H. G. AUNE *et al.*,
Appellants.¹

PROCESS—PUBLICATION—MAILING SUMMONS — JUDGMENTS — VACATION—FRAUD. Where plaintiff knew a nonresident defendant's post-office address, service by publication without mailing a copy of the summons confers no jurisdiction, although plaintiff made affidavit that he did not know defendant's "residence"; and the judgment is properly vacated for fraud.

JUDGMENT—COLLATERAL ATTACK. An action to set aside a decree fraudulently obtained is a direct and not a collateral attack, although further relief by way of quieting title is asked and may be given if found appropriate.

TAXATION—FORECLOSURE BY COUNTY—SUMMONS—NAME OF OWNER. A tax foreclosure proceeding is a proceeding *in rem*, and it is immaterial what name or names of the owners are used in the summons.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered October 5, 1907, upon findings in favor of the plaintiffs, quieting title, after a trial on the merits before the court without a jury. Affirmed.

¹Reported in 96 Pac. 688.

Fairchild & Bruce, for appellants.

T. W. Hammond, for respondents.

Root, J.—This is an appeal from a judgment and decree rendered upon the issues presented in two actions that had been consolidated for the purposes of trial, said actions having to do with certain real estate, sold or attempted to be sold pursuant to tax foreclosure proceedings. The property in question appears to have been assessed in 1894 to one Henry Aune, and in 1895 to "Henry Aunie." The record does not show what name appears upon the assessment rolls at any time subsequent to 1895 or prior to 1894, except that for the year 1893 no name was used upon the assessment roll, nor was it assessed as "unknown." The taxes not being paid for the years 1893, 1894, and 1895, a certificate of delinquency was issued in 1898 to Pierce county, describing the owner as "Henry Acenie." The county foreclosed in a general action, with service by publication, wherein the name of the owner was given as "Henry Acenie." The property was purchased by respondent H. E. Noble, and a deed for the same delivered to him by the county treasurer. Thereafter he had certain personal interviews and some correspondence with Henry Aune, or his successor in interest, H. G. Aune, one of appellants, relative to a quitclaim deed to the property. Said Noble was then living in Portland, Oregon, to which place his letters were directed by Aune, and from which place the latter received letters from Noble bearing the latter's street address. Shortly after the correspondence closed, Aune brought an action to set aside the tax foreclosure proceedings, and made an affidavit that he did not know the residence of respondent Noble, and that he was a nonresident of the state of Washington. Thereupon summons was published in the *Eatonville Eagle*, a newspaper published in a small town and having a very limited circulation. No personal service was had upon either of respond-

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ents, and no copy of the summons or complaint was sent to them or either of them. A decree setting aside the foreclosure decree and sale of the property was taken in due time and regularly entered. All of these proceedings were had without the knowledge of respondents or either of them. The latter, after hearing of said proceedings, commenced one of the actions consolidated herein to set aside the decree referred to, upon the ground that jurisdiction was obtained by fraud and perjury.

Appellants virtually concede that Aune knew respondents' postoffice address, but argue that "residence" and "postoffice address" are not synonymous, and that the fact that they knew the postoffice address of Noble did not prevent them from in good faith making the affidavit that they did not know his "residence." After the decree was entered setting aside the foreclosure decree and the sale to respondent thereunder, appellant Aune sold the property to appellant King, who some time thereafter began an action against respondents and others to quiet her title to the premises. This action was consolidated with that instituted by respondents against Aune and King, and after trial the superior court entered a decree setting aside the decree by which the foreclosure decree and sale were set aside, and cancelled the deed of Aune to King, and quieted title in respondents herein. We think that Aune was under obligations to send a copy of the summons to Noble, inasmuch as he knew his postoffice address, and the fact that he did not do so, but proceeded to take judgment on a summons by publication, amounted to a fraud against respondents, and that the court did not acquire jurisdiction in the case.

It is urged by appellants that this is a collateral attack, inasmuch as the respondents seek to quiet title as well as to set aside the former judgment and decree. We do not think this position tenable. The action was brought expressly to set aside the decree that had been fraudulently obtained, and

it was proper that further relief in the matter of quieting title should be asked for and granted, if found appropriate.

It is contended by appellants that the original tax proceeding was invalid for the reason that the court had no jurisdiction, inasmuch as in the foreclosure proceedings the name of the owner was given as "Henry Acenie" instead of "Henry Aune," as it had appeared in the tax roll for some of the years for which taxes were delinquent. We think this contention cannot be upheld. This court has repeatedly held a tax foreclosure by a county to be a proceeding *in rem*. *Woodward v. Taylor*, 33 Wash. 1, 73 Pac. 785, 75 Pac. 646; *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Morrison v. Shipman*, 37 Wash. 171, 79 Pac. 632; *Jefferson County v. Trumbull*, 34 Wash. 276, 75 Pac. 876; *Spokane Falls & N. R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623; *McQuade v. Jaffray*, 47 Minn. 326, 50 N. W. 233.

Where a county prosecutes a general foreclosure, it is immaterial what name or names are used in the summons, or whether any is used. The summons is sufficient, in the absence of fraud, if the property is properly described. We recognize a clear distinction between a foreclosure by a county and one by an individual. In the latter case, greater strictness is required—the requirements as to service of summons being much the same as in the foreclosure of a mortgage. *Laws* 1901, pp. 384, 385; *Anderson v. Turati*, 39 Wash. 155, 81 Pac. 557; *Pyatt v. Hegquist*, 45 Wash. 504, 88 Pac. 933.

The judgment and decree of the trial court is affirmed.

HADLEY, C. J., RUDKIN, FULLERTON, and MOUNT, JJ.,
concur.

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[No. 7294. Decided July 16, 1908.]

E. M. DENTON, *Appellant*, v. WALLA WALLA COUNTY *et al.*
Respondents.¹

HIGHWAYS—ROAD TAX—STATUTES—REPEAL—GENERAL AND SPECIAL ACTS. A territorial city charter (Laws 1885-6, pp. 275-6), providing that the county shall not levy any road or road poll tax upon the property or inhabitants of the city, is impliedly repealed by the general revenue law of 1903, p. 223, which provides for a poll tax on certain persons, for the division of all territory outside of cities into road districts, and for the levy upon all taxable property in the county of a tax for a general road and bridge fund, expressly repealing all acts and parts of acts in conflict therewith; since a special law may be impliedly repealed by a general law where the intent so to do is clear.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered January 4, 1907, in favor of the defendants, upon overruling a demurrer to the answer, dismissing an action for an injunction. Affirmed.

M. O. Pickett, for appellant.

Otto B. Rupp and *John H. McDonald*, for respondents.

Root, J.—This action was instituted by appellant, in behalf of himself and all taxpayers similarly situated in the city of Waitsburg, to enjoin the county of Walla Walla and certain of its officials from enforcing a road and bridge tax levied upon the property of appellant and others, within the city of Waitsburg. To the complaint the respondents interposed an answer, setting up that said tax was levied under the general statutes providing for the assessment and levy of a road and bridge tax. Appellant demurred to this answer, and upon the demurrer being overruled, elected to stand thereon; whereupon a judgment of dismissal was entered, from which he prosecutes this appeal.

¹Reported in 96 Pac. 824.

The charter of the city of Waitsburg was granted during territorial days and contained, among others, the following provision: "And there shall not be levied or collected by the county of Walla Walla or the officers thereof any road tax or road poll tax upon the property or inhabitants within the said city." Laws of 1885-6, pp. 275-6. This provision has not been amended or repealed by direct legislation. It is the contention of respondents that said charter provision was repealed by the general revenue law of 1903, p. 223. Section 1 of said statute provided for a poll tax levied upon certain persons in the state. Section 7 provided that all the territory of the county, exclusive of incorporated cities and towns, should be divided into road districts. Section 8 provided for the levy upon all the taxable property in the county of a tax for a general road and bridge fund.

It is urged by appellant that a special statute is not repealed by a general statute unless there is a clear intention so to do manifested, and that such is not the case here. Respondents contend that the statute of 1903 manifests a clear intention on the part of the legislature to impose a road and bridge tax upon all the property of the county, and that this necessarily contravenes the provisions of the city charter above quoted. We think this position must be sustained. We think the statute, taken as a whole, manifests an intention and a general policy which is entirely inconsistent with the idea of said charter provision remaining in force. In the case of *Northern Pac. R. Co. v. Haas*, 2 Wash. 376, 26 Pac. 869, this court said:

"As a rule, it will not be held that a special act is repealed by implication by a general one upon the same subject. The intention of the legislature, however, in enacting the several laws, is what is to be arrived at; and, if it sufficiently appears that it was intended that a subsequent general law should supersede all prior legislation upon the same subject, general or special, though not expressly so stated, effect should be given to such purpose."

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That was a case where a general law was held to repeal by implication a charter provision of a city. In the case of *State ex rel. Whatcom County v. Purdy*, 14 Wash. 343, 44 Pac. 857, this court said:

"But, even if the act of February 3, 1886 (Laws 1885-6, p. 108), were a special law, it does not necessarily follow that it could not be repealed by the provisions of the general act; for the rule is that, if by the terms of the general law it becomes evident that the intention of the legislature was to repeal the special law, it is the duty of the courts to hold the special law repealed."

See, also, *Cairo v. Bross*, 9 Ill. App. 406; *Barker v. Town of Floyd*, 61 App. Div. 92, 69 N. Y. Supp. 1109; *Fraim v. Lancaster County*, 171 Pa. St. 436, 33 Atl. 339; *Howard v. Hulbert*, 63 Kan. 793, 66 Pac. 1041, 88 Am. St. 267.

The title of the act of 1903 indicates that the act is to repeal all acts and parts of acts in conflict therewith, and the last section of the act reads: "All acts and parts of acts in conflict with the provisions of this act are hereby repealed." We think it was manifestly the purpose and intention of the legislature in enacting this statute to provide a uniform method of levying road and bridge taxes, which should cover the property situated as was that of appellant herein, and that the charter provision in question was by implication repealed.

The judgment of the superior court is affirmed.

RUDKIN, FULLERTON, and CROW, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7232. Decided July 16, 1908.]

DANIEL A. MORRISON, *Appellant*, v. JOHN WILLIAMS *et al.*,
Respondents.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—RAILROADS—OPERATION—DEFECTIVE CONDITION OF SWITCH YARD—EVIDENCE—SUFFICIENCY. An experienced railway switchman, who has worked thirteen days in an unfinished yard then in course of construction, assumes the risk, and a nonsuit is properly granted, where he was riding on the footboard and could see a considerable distance ahead and could signal the locomotive to stop at any time, that earth was piled alongside the tracks for surfacing, and that the footboard caught on such earth causing a derailment and resulting in his injury, the conditions being open and apparent.

Appeal from a judgment of the superior court for King county, Rigg, J., entered August 22, 1907, in favor of the defendants, upon sustaining a challenge to the sufficiency of the evidence, in an action for personal injuries sustained by a switchman through the derailment of a railway engine. Affirmed.

John E. Humphries and *Geo. B. Cole*, for appellant.

L. C. Gilman and *B. O. Graham*, for respondents.

HADLEY, C. J.—This is an action to recover damages for personal injuries. A challenge to the sufficiency of the evidence to authorize any verdict for the plaintiff was sustained at the close of the testimony, and judgment was entered for the defendants. Plaintiff has appealed.

The appellant was a switchman in the employ of the respondent the Great Northern Railway Company, and at the time of his injury was engaged in the switching service in the Seattle yards of said company. The respondent Williams was at the time a general switch foreman of the railway company. Appellant was thirty-six years of age, and had been a switchman for nine years. He had been working for the re-

¹Reported in 96 Pac. 691.

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Opinion Per HADLEY, C. J.

spondent railway company at that place for thirteen days. The company's yards were at that time in course of construction, and were in an uncompleted condition. Ties and rails were being placed and earth was being brought in for the purpose of surfacing, which was placed alongside the track awaiting its distribution. While the tracks were in this incomplete condition, they were being used for transfer purposes, and their condition and the presence of the earth on the sides thereof were plainly apparent and were well known to the appellant. While one of the tracks was in this condition, a switch engine went upon it. Appellant was riding on the footboard in front of the engine, and he could see a considerable distance ahead. He was riding on the left-hand side and the engine was proceeding slowly. He could have given a signal to stop it at any time, and his signal would have been obeyed. While the engine was proceeding in this manner, the footboard caught in the earth piled alongside the track, resulting in a derailment, and the appellant's foot was caught between the ties and the footboard. The injury was not serious, and appellant had largely recovered at the time of the trial.

The above facts were clearly shown by the evidence and there is no dispute about them. We think that appellant, as a man of years of railway experience, having full knowledge of the unfinished condition of the tracks and of the general peculiarities of the situation where he was working, assumed the risk of any injury that might result from the open and apparent situation. The rule as to assumption of the risk applies generally to those employees having actual knowledge of an open and defective condition of a railway track, and is stated as follows in vol. 4, § 4798, Thompson's Commentaries on the Law of Negligence:

"If a railroad employee knows that the general condition of the track is defective in certain particulars, but nevertheless continues in the employment, he assumes the risk of in-

jury from all defects of that nature, whether specially known to him or not. This is especially true with respect to an employee who is charged with the duty of looking after the reparation of the roadbed, and who knows of its defective condition. Outside of this, the employees below named have been held to assume the risk of injury from the danger stated in each case: A railway-switchman, the risk of injury from worn rails used in side-tracks, of which he has knowledge; an engineer and conductor of a construction-train, who knows the manner in which a trestle is constructed and that there is an unprecedented flood, but who nevertheless attempts, without compulsion or necessity, to drive his train across the bridge; a railway-engineer who knows and understands the liability of the engines used by the company to scatter fire, and who is acquainted with the character and extent of a watch kept upon a wooden bridge forming a part of the roadway, the risk of injuries due to the burning of the bridge by sparks escaping from a locomotive; a locomotive-engineer who knows that there are no track-walkers or night-watchmen on a bridge over which he is obliged to drive his train, the risk of a disaster in consequence of their absence."

It is also stated, in § 4794 of the same volume, that there is an obvious distinction between the extent of the assumption of the risk by the railway employee in the case of a track which has been completed and is open for public service, and one which is known to the employee to be undergoing construction or reparation. Of course, in the latter case the extent of the risk assumed is greater. Such was the appellant's situation, and we do not think the court erred in granting the challenge to the evidence.

The judgment is affirmed.

FULLERTON, RUDKIN, and CROW, JJ., concur.

MOUNT and ROOT, JJ., took no part.

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Opinion Per HADLEY, C. J.

[No. 7277. Decided July 16, 1908.]

DORA HERBERT, *Respondent*, v. CLARENCE DAYTON
HILLMAN, *Appellant*.¹

TRIAL—PROVINCE OF JURY—CREDIBILITY AND WEIGHT OF EVIDENCE. It is the province of the jury to pass upon the credibility of the witnesses and the weight of the evidence.

VENDOR AND PURCHASER—CONTRACT FOR SALE—BREACH BY VENDOR—MEASURE OF DAMAGES—INSTRUCTIONS. The measure of damages for the breach of a contract to convey land, where the vendor subsequently sold the same to another, is the amount paid by plaintiff and the increase in value above the purchase price at the time of the breach; and an instruction fixing the damages at the difference between the amount agreed to be paid and the market value at the time of the breach, less the unpaid amount due on the price, is error, requiring a new trial, even if disregarded by the jury.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 25, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the breach of a contract to convey land. Reversed.

Frederick R. Burch, John A. Saboe, and Oliver Hulback,
for appellant.

Frank C. Park, for respondent.

HADLEY, C. J.—The plaintiff entered into a written contract with the defendant to purchase of the latter two lots in Hillman's Meadow Gardens addition to the city of Seattle. The agreed price was \$250. The plaintiff paid \$25 in cash when the contract was executed, and the remainder was to be paid in deferred payments of \$5 per month. After several payments were made, the defendant sold and conveyed the land to an innocent third person. Payments were also received by defendant from plaintiff after the conveyance to the third party. Upon discovering that the lots had been deeded to another, the plaintiff brought this suit for damages. She

¹Reported in 96 Pac. 837.

alleged that she had paid \$90 upon the purchase price and that the property had increased in value from \$250 to \$500. She demanded damages in the sum of \$340. The cause was tried before a jury, and a verdict was returned for plaintiff in the sum of \$340. Judgment was entered for that amount and the defendant has appealed.

It is assigned that it was error to deny the motion for new trial, and it is argued that the evidence is insufficient to justify the amount of the verdict. The testimony conflicts as to the increased value of the property, but there is evidence in the record of a sufficient increase to sustain the amount of the verdict. The value at the time of the breach was placed as high as \$500. It is true appellant's witnesses placed a much lower valuation upon the property, but it was the province of the jury to pass upon the credibility of the witnesses and the weight of the testimony. It was therefore not error for the trial court to refuse to set aside the verdict merely upon the ground of insufficient testimony.

It is, however, contended that the court erred in giving the following instruction upon the measure of damages:

"If you find for the plaintiff on the other issues in the case, it will be necessary for you to assess the damages, and the damages are just what in law will legally compensate her for breach of the contract by the defendant. The measure of damage is the difference between the amount agreed to be paid by the plaintiff and the market value of the property at the time of the breach of contract by the defendant less the unpaid purchase amount due on the purchase price; and if you find for the plaintiff, it may be necessary for you to determine whether or not, at the time of the breach of this contract, at the time Mrs. Herbert ascertained that Mr. Hillman could not perform the contract, what the market value was at that time, and if it was greater than the amount which Mrs. Herbert agreed to pay for the land, just that difference less the unpaid portion of the purchase price would constitute the damages."

We think the measure of damages stated in the instruction is erroneous. We believe that the proper amount for re-

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covery includes the return of the \$90 paid upon the purchase price, together with the increase in value above the purchase price at the time of the breach, if any. It is true the amount of the verdict may be sustained by the above rule under the evidence in the case. The increase in value having been placed as high as \$250, if that sum should be added to \$90, the amount paid upon the purchase price, it would make \$340, the amount of the verdict. But under no interpretation of the instruction can we conclude that a recovery could be had for more than \$90, having in view the evidence in the case. In the course of the instruction the court twice stated the rule as to the measure of damages, each statement differing from the other somewhat in words but leading to the same result. Taking the above figures as the basis of calculation, then under the instruction the jury should have taken the difference between the amount agreed to be paid—\$250—and the market value at the time of the breach—\$500. This is \$250. The instruction then told the jury to deduct from the last-named sum the amount unpaid on the purchase money, which is \$160. It will be seen that the result would have been \$90. It may be said that the instruction was in favor of appellant, but it is manifest that, if the jury attempted to follow the instruction, it became confused and was misled. We therefore think the only proper course is to reverse the judgment and grant a new trial, in order that the measure of damages as we have indicated may be stated to the jury. It is possible that some mistake occurred in transcribing this instruction, which was orally given, but we must take it as we find it in the record.

The judgment is therefore reversed, and the cause remanded with instructions to grant a new trial.

RUDKIN, FULLERTON, and CROW, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 7169. Decided July 16, 1908.]

In the Matter of the Estate of MARY SLOAN, Deceased.
SAMUEL SLOAN, *Appellant*, v. D. W. WEST, *as Administrator*,
*et al., Respondents.*¹

MARRIAGE—EVIDENCE—SUFFICIENCY—PRESUMPTIONS. The contradicted testimony of both parties that they were married by a minister authorized by law to solemnize marriage and that they lived together as husband and wife for some years, is sufficient to establish the validity of a marriage, even although there was to be overcome the presumption arising from a second marriage by the husband without having obtained a divorce; and it is not necessary to show the publication of banns, license, or qualifications of the minister, all of which will be presumed until the contrary appears.

SAME—ESTOPPEL. One who has unlawfully contracted a second marriage while his first wife is living is not estopped to deny his second marriage, as against the administrators of the second woman's estate and her heirs, upon final distribution of the estate, although he joined in the petition for administration, describing the deceased as his wife.

HUSBAND AND WIFE—COMMUNITY PROPERTY—LAWFUL MARRIAGE. There can be no community property without lawful marriage; hence where a woman contracted marriage with a man knowing that he had a wife living, and they agreed to keep their property separate in view of such relation, her heirs by a former husband are not entitled to inherit from her, as community property, any property acquired by the husband.

WITNESSES—TRANSACTION WITH DECEASED. The son of one of the parties is not incompetent to testify as to conversations had with the deceased, since a prospective heir is not a party in interest.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 28, 1907, upon granting a nonsuit at the close of plaintiff's case, in an action to quiet title. Reversed.

Frank A. Steele, Walter B. Beals, and Hastings & Steadman, for appellant.

W. E. Humphrey and Edward Von Tobel, for respondents.

¹Reported in 96 Pac. 684.

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Opinion Per RUDKIN, J.

RUDKIN, J.—Samuel Sloan and Alice Babcock, sometimes known as Elsie Babbirk, intermarried in Albert county, New Brunswick, about the year 1852 and remained husband and wife until the marriage was dissolved by decree of the superior court of Kitsap county, on the 14th day of April, 1902, at the suit of the husband. The parties to this marriage lived together in New Brunswick as husband and wife for some years after the consummation of the marriage, and then separated. In the year 1868 the husband came to Washington Territory, and has resided in the territory and state ever since. In the year 1873 he returned to New Brunswick, and there married one Mary Steves early in the year 1874, while his former wife was still living and undivorced. Immediately after this marriage, he returned to Washington Territory with Mary Sloan or Mary Steves, and the parties continued to live together here as husband and wife from that time until the death of the latter, on the 6th day of February, 1899. On the 19th day of April, 1902, D. W. West, a son-in-law of Mary Steves, petitioned the superior court of King county for letters of administration on her estate, as the deceased wife of Samuel Sloan, and Samuel Sloan joined in the petition. The prayer of the petition was granted and the administration proceeded until the 31st day of January, 1905, at which time a final account of the administration was rendered and a petition for distribution filed. The petition for distribution prayed that one-half the residue of the estate be distributed to Samuel Sloan, as surviving husband, and the other half to certain children of Mary Steves by a former husband, and to the representatives of certain deceased children.

At this juncture, Samuel Sloan filed his petition in the estate matter, setting forth his marriage with Alice Babcock long prior to his marriage with Mary Steves; that his former marriage was not dissolved until long after the death of Mary Steves; that Mary Steves knew at all times that the

petitioner had a lawful wife living; that it was agreed between the petitioner and Mary Steves that a fair proportion of all property earned or acquired by them should be given to her as her separate estate; that this agreement was carried out, and that Mary Steves received for her own use and benefit one-half of all property acquired by them in this state; that the petitioner was absent in Alaska when Mary Steves died, and that on his return to this state her son-in-law represented to him that it would be necessary to take out letters of administration on her estate in order to perfect title to the remaining property in the petitioner; that certain false and fraudulent representations were made; that the property sought to be distributed is the sole and separate property of the petitioner and should be distributed to him, etc. The allegations of this petition were put in issue by answers filed by the administrator and the heirs at law of Mary Steves, deceased, and a trial was had. At the close of the petitioner's case the court granted a motion for nonsuit, and from the judgment of nonsuit this appeal is prosecuted.

The existence of the marriage between the appellant and Alice Babcock is controverted, but that marriage is established by clear and cogent proof. The fact that the parties were married about the date specified, in the presence of witnesses, by a Baptist minister authorized by the laws of the Province of New Brunswick to solemnize marriage, and that they thereafter lived together as husband and wife for some years, was testified to by both of the contracting parties and by several disinterested witnesses, and was in no wise contradicted or controverted.

"The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the

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presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence." *Hynes v. McDermott*, 91 N. Y. 451.

We are not unmindful of the fact that the presumption which ordinarily attaches to the first marriage is now transferred to the second, and that stronger proof of the validity of the first marriage is required than if the second did not exist. The presumption which attaches to the second marriage, however, only overcomes a presumption of marriage arising from reputation and cohabitation, and is not sufficiently strong to overcome such proofs of marriage as are found in this record. The proof here is ample to establish the validity of the first marriage, even in a criminal prosecution for bigamy, much less in a civil action where property rights alone are involved. *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162; *Fleming v. People*, 27 N. Y. 329; *People v. Calder*, 30 Mich. 85; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 742; *Damon's Case*, 6 Me. 148.

The respondents contend that there is no proof that banns were published, that a license was obtained, that the officiating clergyman was a British subject, or that the marriage was not dissolved. The authority of the officer or clergyman performing the marriage ceremony, and all the prerequisites of a valid marriage will be presumed until the contrary is made to appear. *Meggison v. Meggison*, 21 Ore. 387, 28 Pac. 388, 14 L. R. A. 540, and note. Both of the contracting parties testified that the marriage between them was not dissolved until long after the death of Mary Steves, and this proof overcomes any presumption that the court might otherwise indulge.

It is further contended that the appellant is estopped to deny the validity of his marriage to Mary Steves, or the fact that the property in controversy is the community property of himself and Mary Steves. Doubtless parties are some-

times estopped to deny their marriage as to third persons who have been misled to their prejudice, but, as between husband and wife and parent and child, there is no such status known to the law of domestic relations as marriage by estoppel. Nor is the appellant estopped by reason of anything contained in the administration proceedings. *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107; *Hatch v. Ferguson*, 57 Fed. 966. If there was no lawful marriage between the appellant and Mary Steves, as a matter of course there is and can be no community property. *Hatch v. Ferguson, supra*; *Kelley v. Kitsap County*, 5 Wash. 521, 32 Pac. 554; *Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316; *Routh v. Routh*, 57 Tex. 589; *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. 564; 21 Cyc. 1636; 6 Am. & Eng. Ency. Law (2d ed.), 297.

We therefore hold that the proofs in the record amply show that the appellant and Mary Steves were never lawfully married, and that the property involved in this action is not community property. If the respondents have any interest in the property as children or grandchildren of Mary Steves, deceased, the burden is upon them to establish that fact, as it does not arise out of any marriage relation. We cannot anticipate the questions that may arise in the further progress of the trial, and all such questions must be left open for future consideration. We do hold, however, that if it should appear that there was no lawful marriage between the appellant and the deceased, that the deceased was at all times fully aware of their meretricious relations, and that in view of such relations their property was kept separate and apart; the respondents have no right or interest in the property now in controversy. In view of the retrial that must follow a reversal, we will add, further, that the court was in error in excluding the testimony of Samuel H. Sloan, a son of the appellant, on account of interest in the subject-matter of the action. The only possible interest the witness had or could

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have, under the facts disclosed by the record, was that of a prospective heir. But the rule is well established that the living have no heirs, and that the interest of the ancestor does not disqualify the heir apparent.

"The *true test of the interest* of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action. It must be a present certain, and vested interest, and not an interest uncertain, remote, or contingent. Thus the heir apparent to an estate is a competent witness in support of the claim of his ancestor; though one who has a vested interest in the remainder, is not competent. And if the interest is of a *doubtful nature*, the objection goes to the credit of the witness, and not to his competency. For, being always presumed to be competent, the burden of proof is on objecting party, to sustain exception to the competency; and if he fails satisfactorily to establish it, the witness is to be sworn." 1 Greenleaf, Evidence (14th ed.), § 390.

For the error in granting the nonsuit, the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

DUNBAR, CROW, and MOUNT, JJ., concur.

HADLEY, C. J., and FULLERTON, J., took no part.

[No. 7206. Decided July 16, 1908.]

COLFAX NATIONAL BANK, *Respondent*, v. A. J. DAVIS *et al.*,
Appellants.¹

JURORS—CHALLENGE—STATUTORY PROVISIONS. Under Bal. Code, § 4979, providing that where there are several parties on either side, they must join in a challenge to a juror, a challenge by defendants separately appearing is properly denied where one of the defendants refuses to join therein.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered July 3, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action on an implied contract of employment. Affirmed.

John Pattison, for appellants.

U. L. Ettinger, and *McCroskey & Canfield*, for respondent.

RUDKIN, J.—This action was instituted by the Colfax National Bank, against The Davis Implement Company and A. J. Davis and I. J. Davis, to recover a balance due for services performed and moneys paid out and expended in experting and checking up the books of account of The Davis Implement Company, at the special instance and request of the defendants. The defendant The Davis Implement Company and the defendants A. J. Davis and I. J. Davis severed in their defenses, and the case came on for trial. During the empanelling of the jury, the defendants A. J. Davis and I. J. Davis interposed a peremptory challenge to one of the jurors, but the court refused to entertain or allow the challenge unless joined in by all the defendants. The defendant The Davis Implement Company refused to join in the challenge and the challenge was disallowed. The trial resulted in a verdict and judgment for the plaintiff, and the defendants A. J. Davis and I. J. Davis have appealed.

¹Reported in 96 Pac. 823.

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Opinion Per RUDKIN, J.

The only error assigned is the ruling of the court in disallowing the peremptory challenge. A decision of this question turns entirely upon the construction to be given Bal. Code, § 4979 (P. C. § 593), as there was no right of peremptory challenge in civil actions at common law. Section 4979 provides as follows:

“Either party may challenge the jurors, but when there are several parties on either side, they shall join in the challenge before it can be made. The challenge shall be to individual jurors, and be peremptory or for cause. Each party shall be entitled to three peremptory challenges.”

This statute expressly provides that if there are several parties on either side of a controversy they must all join in the challenge, and the language is so plain and free from ambiguity that little room is left for construction. The appellants rely largely on the decisions in *Stroh v. Hinchman*, 37 Mich. 490, and *Hundhausen v. Atkins*, 36 Wis. 518. The Michigan case holds that the right of separate challenge exists in favor of each defendant who pleads separately by different counsel. The Wisconsin case holds that,

“When their defenses are essentially different, especially when these are hostile, defendants must necessarily sever in their answers; and as each has a distinct issue to maintain, we think that each is to be considered a party, within the meaning of sec. 37, ch. 118.”

But even the decision in the Wisconsin case would not entitle the appellants to separate challenges under the issues here presented, for there the court said:

“Undoubtedly when several defendants in a civil action join in their defense, or, severing in their answers, set out but one defense, common to them all, they constitute one party, limited to the statutory number of challenges given to a party, as ruled in this cause in the court below. In such a case, they might and perhaps ought to join in one answer, setting up the common defense; and they should not be permitted to gain additional challenges by the mere act of

severing in their pleadings. They have a community of interests, and should be left to a community of challenges."

But the Michigan and Wisconsin statutes differ widely from our own. The former provides that, "In all civil cases each party may challenge peremptorily two jurors;" and the latter that, "On the trial of any civil cause now pending, or hereafter to be commenced in any of the circuit courts of this state, each party shall be entitled to three peremptory challenges of jurors empanelled in said cause." These statutes make no provision for joining in challenges where there are several parties on either side of the controversy, and it might be consistently held under them that each defendant appearing separately with an interest adverse to his co-defendants constitutes a party within the meaning of the statute. But the great weight of authority is against these decisions, even under similar statutes. *Schmidt v. Chicago & Northwestern R. Co.*, 83 Ill. 405; *Stone v. Segur*, 11 Allen 568; *McClay v. Worrall*, 18 Neb. 44, 24 N. W. 429; *People v. O'Laughlin*, 3 Utah 133, 1 Pac. 653; *Bibb v. Reid & Hoyt*, 3 Ala. 88; *Snodgrass v. Hunt*, 15 Ind. 274; *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267; *United States v. Hall*, 44 Fed. 883, 10 L. R. A. 322; *Bryan v. Harrison*, 76 N. C. 360; *Blackburn v. Hays*, 44 Tenn. 227. And where the statute requires the several parties on either side to join in the challenge, the rule allowing parties appearing separately to interpose separate challenges cannot obtain. *United States v. Alexander*, 2 Idaho 386, 17 Pac. 746; *San Luis Obispo County v. Simos* (Cal. App.), 81 Pac. 972; *Cleveland v. Atkinson*, 94 Iowa 621, 63 N. W. 465.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., CROW, FULLERTON, and MOUNT, JJ., concur.

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Opinion Per RUDKIN, J.

[No. 7276. Decided July 16, 1908.]

THE STATE OF WASHINGTON, *on the Relation of John
Cicoria, Respondent*, v. JOHN CORGIAT *et al.*,
*Appellants.*¹

MANDAMUS—PARTIES—NAME OF PLAINTIFF—PLEADINGS—AMENDMENT. Under Bal. Code, § 5738, providing that a party prosecuting a special proceeding may be known as the plaintiff and the adverse party as the defendant, it is not error to refuse to quash a proceeding commenced in the name of the real party in interest, instead of in the name of the state on his relation according to sanctioned practice, especially where the plaintiff was required to amend the complaint to cure the objection made.

SAME—PROCEEDINGS—SUMMONS AND COMPLAINT. A mandamus proceeding may be commenced by the filing and service of a summons and complaint, rather than by motion and affidavit.

BENEFICIAL ASSOCIATIONS—MEMBERSHIP—EXPULSION—NOTICE OF HEARING. A mutual benefit society has no power to expel a member without giving him notice and an opportunity to be heard.

APPEAL—PRESERVATION OF GROUNDS—FINDINGS—NECESSITY—MANDAMUS. Error cannot be assigned in the failure of the court to make findings of fact and conclusions of law in mandamus proceedings, where no request therefor was made below.

BENEFICIAL ASSOCIATIONS—REVISION OF ACTS—JURISDICTION OF COURTS. The courts are compelled to revise acts of beneficial societies where pecuniary and property rights have been illegally abridged or invaded.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 2, 1907, directing the issuance of a writ of mandamus to compel reinstatement in a fraternal benefit society. Affirmed.

Vince H. Faben and *Walter A. Keene*, for appellants.

McBurney & Cummings, for respondent.

RUDKIN, J.—This is an appeal by the Joseph Mazzini Society and others, from a judgment in mandamus proceed-

¹Reported in 96 Pac. 689.

ings by which the appellants were commanded to restore the respondent to his rights and privileges as a member in good standing of the appellant society. The Joseph Mazzini Society is a fraternal benefit association organized under the laws of this state. Each member, on admission to the society, must pay an admission fee, varying from \$5 to \$50 according to age, and monthly dues of \$1 per month thereafter. The by-laws also provide for special assessments. In return each member of the Society receives a sick benefit of \$10 per week for a period of not to exceed six months, during illness or other physical disability. A further allowance of \$10 per month may be made, in the discretion of the society, after the expiration of the six months period. The society also expends the sum of \$75 for the burial of each of its members. The respondent was a member of the society in good standing for several years prior to the 9th day of June, 1907. On that day he was expelled from the society, without notice or opportunity to be heard, for the alleged publication of an article affecting the president of the society. The following are the assignments of error discussed in the appellants' brief: (1) Error in denying the motion to quash the alternative writ; (2) error in denying the motion for nonsuit; and (3) error in entering judgment without findings of fact or conclusions of law.

The motion to quash was based on two grounds; first, because the proceeding was instituted in the name of the real party in interest, instead of in the name of the state on the relation of the party beneficially interested; and, second, because the proceeding was commenced by summons and complaint, and not by motion and affidavit. Bal. Code, § 5738 (P. C. § 1393), provides that "The party prosecuting a special proceeding may be known as the plaintiff and the adverse party as the defendant." Under this section it would seem that special proceedings such as certiorari, mandamus and prohibition should be prosecuted in the name of the real

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party in interest, but the practice of prosecuting such proceedings in the name of the state on the relation of the party beneficially interested was sanctioned by this court in *State ex rel. Weinberg v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. The question is one of little moment here, for the court required the respondent to amend his complaint to conform to the contention of the appellants, and this practice was approved by the court in the case cited. The objection that the proceeding was commenced by summons and complaint, rather than by motion and affidavit is untenable. In discussing this question in *Clark County v. Braze*, 1 Wash. Ter. 199, the court said:

"We consider that the difficult learning of the old writs of mandamus and prohibition is rendered mainly obsolete by the Practice Act. That under it the essential idea of an action is that a remedy be asked for by a plain statement of the facts which create a right to it, and that judgment go according to that remedy when found due, and that this simplicity of statement and conformity of judgment obtains as well when the demand is that the defendant be compelled to do or abstain from doing something, as when it is that plaintiff recover a sum of money on a note.

"This case may be stated substantially thus: After some preliminary irregularity the plaintiff and defendant found themselves face to face in court. The plaintiff making claim that the defendant be constrained in his action, in a defined legal mode, and alleging the facts justifying it, the defendant insisted that the plaintiff had not called his proceeding by the right name, had taken unnecessary or unusual steps by the way, that the plaintiff should be required to go out of court and come back again by a more technical route. But he made no defense of insufficient notice, none of venue, none touching the substantial justice of the demand, and confined his defense, so far as merits were concerned, to the position that the facts averred being true would not entitle to the remedy asked. He might have denied them; he chose to concede them and rely on quiddities which we consider the practical and just spirit of our code will not tolerate. We are

not satisfied that injustice has been done him, and cannot consent to disturb the judgment below."

The argument in support of the motion for a nonsuit is based upon the ground that the court erred in holding that the expulsion of the respondent, without notice or opportunity to be heard, was void. This ruling however is supported by the great weight of authority. In Niblack on Benefit Societies and Accident Insurance, at § 61, the author says:

"It may be stated, as the general rule, that a society, the members of which become entitled to privileges or rights of property therein, may not exercise its power of expulsion without notice to the member, or without giving him an opportunity to be heard. It is a fundamental principle of law, recognized in every court of justice, that no man shall be condemned or prejudiced in his rights, without an opportunity to be heard. A society, or select number of its members, to whom authority is given in the premises, is a court when passing on the rights of its members. *Audi alteram partem* is the first principle in the administration of justice, and it is against natural justice to proceed against one's rights without giving him an opportunity to be heard in defense of them. It is competent for the members of a society organized for the purpose of mutual insurance, to agree that the non-payment of an assessment levied by it, within a stipulated period of time after notice of the assessment, shall *ipso facto* operate as an expulsion of a delinquent member from the society. Such an expulsion is in reality a forfeiture of rights for a cause over which the member has full control, and for a cause which imputes to the member no disgraceful conduct. But it is a well established rule of law that no man shall be condemned to suffer the consequences resulting from alleged misconduct, until he has been notified of the accusation, and been given an opportunity to make his defense. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal, or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals. A by-law providing that a member may be expelled for any alleged

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misconduct, without notice to him, and without affording him an opportunity to be heard, is in conflict with the law of the land, and is void."

See, also, Bacon, Benefit Societies, § 101; 3 Am. & Eng. Ency. Law (2d ed.), p. 1073, and cases cited.

The next and last error assigned is the failure or refusal of the court to make or enter findings of fact and conclusions of law. In *Slayton v. Felt*, 40 Wash. 1, 82 Pac. 173, we held that error could not be predicated on the failure of the court to make findings of fact, in law actions, in the absence of a special request for such findings, and no such request was made in this case. The appellants earnestly insist that courts should close their doors against applications of this character and compel members of voluntary associations, such as the appellant society, to seek protection for their rights and redress for their grievances within the society of which they are members. We would gladly adopt this view, but unfortunately, where pecuniary and property rights are involved, the courts must listen to the complaint of members whose rights have been abridged or invaded by the arbitrary and illegal actions of the governing body within the society. *Otto v. Journeymen Tailor's Protective & Benevolent Union*, 75 Cal. 308, 17 Pac. 217, 7 Am. St. 156; *Von Arx v. San Francisco Gruetli Verein*, 113 Cal. 377, 45 Pac. 685; *Dubcich v. Grand Lodge A. O. U. W.*, 33 Wash. 651, 74 Pac. 832; *Kelly v. Grand Circle Women of Woodcraft*, 40 Wash. 691, 82 Pac. 1007.

A motion was interposed sometime ago to dismiss the appeal herein on the ground that the appeal was prosecuted without authority from the society, and because the subject-matter of the controversy had ceased to exist. A spirit of anarchy seems to have pervaded the society at the time this motion was interposed, and it is impossible for us to say, from the contradictory affidavits filed, who is in authority or who has a right to speak or move for the society. We

therefore decline to pass upon this motion, inasmuch as the same result will be accomplished by an affirmance of the judgment.

Judgment affirmed.

HADLEY, C. J., DUNBAR, FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

[No. 7368. Decided July 16, 1908.]

SAMUEL R. STERN, *Respondent*, v. STATE BOARD OF DENTAL EXAMINERS, *Appellant*.¹

STATES—STATE DENTAL BOARD—AUTHORITY TO EMPLOY ATTORNEY—CRIMINAL LAW—PROSECUTIONS—PRIVATE COUNSEL. The authority of the state dental board to employ private counsel does not depend upon the consent of the prosecuting attorney, under Bal. Code, § 3031, requiring the consent of the prosecuting attorney to assistance by private counsel in prosecutions by the state dental board; consent being necessary only to participation in the prosecution.

CRIMINAL LAW—PROSECUTIONS—PRIVATE COUNSEL. Where private counsel of the state dental board assisted in prosecutions instituted by the board, it will be presumed that the prosecuting attorney consented thereto as required by Bal. Code, § 3031.

JUDGMENTS—COLLATERAL ATTACK. A judgment cannot be attacked by objection to the sufficiency of the complaint in the action, in a collateral proceeding brought to enforce the judgment.

STATES—ACTION AGAINST BOARD. An action and judgment against the state dental board is not against the state, and the state is not bound thereby.

SAME—STATE BOARDS—ACTIONS—CAPACITY TO BE SUED. The state dental board has incidental capacity to be sued by individuals, independently of statute, as a corporation *sub modo*.

SAME—JUDGMENTS—AGAINST STATE DENTAL BOARD—ENFORCEMENT—SUPPLEMENTAL PROCEEDINGS. Bal. Code, § 5676, providing for the manner of enforcing judgments against public corporations paying claims and demands by orders or warrants drawn on the treasurer, does not preclude supplemental proceedings to enforce a judgment

¹Reported in 96 Pac. 693.

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against the state dental board, which under Bal. Code, §3031, handles its funds and satisfies its claims the same as any individual or corporation.

SAME—MANDAMUS—CONCURRENT REMEDY. If judgment against the state dental board may be enforced by mandamus proceedings, under Bal. Code, § 5755, it is no more than a concurrent remedy, and does not exclude proceedings supplementary to the judgment.

SAME—RECEIVERS—FUNDS OF STATE BOARD. Where the state dental board refuses to apply, in satisfaction of a judgment, funds received and collected by it which are not public or state funds, the court has jurisdiction in supplemental proceedings to appoint a receiver to collect and apply the funds.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered January 23, 1908, appointing a receiver. Affirmed.

The Attorney General and E. C. Macdonald, Assistant,
for appellant.

W. F. Meier and Samuel R. Stern, for respondent.

RUDKIN, J.—On the 1st day of November, 1907, the plaintiff in this action recovered judgment against the State Board of Dental Examiners for the sum of \$1,424.66 and costs of suit. An execution issued on the judgment was returned unsatisfied, and the plaintiff thereupon made affidavit that the defendant had funds in its possession and under its control which it refused to apply in satisfaction of the judgment, and prayed that the defendant be examined in supplementary proceedings. On such examination the court found that the defendant had money in its possession and under its control which should be applied on the plaintiff's judgment, and appointed a receiver to take charge of, receive and collect all funds in the possession or under the control of the defendant and apply the same toward the satisfaction of the plaintiff's demand.

From the order appointing the receiver, this appeal is prosecuted, and the appellant makes the following conten-

tions in support of its appeal: (1) That the original judgment in favor of the respondent is void; (2) that the remedy of the respondent is by writ of mandamus; and (3) that the court was without jurisdiction to appoint the receiver. It is claimed that the original judgment is void for two reasons; first, because the complaint failed to allege that the respondent was employed to assist in prosecutions for the violation of the dental act, by the consent of the prosecuting attorneys of the several counties in which such prosecutions were instituted, as required by Bal. Code, § 3031; and, second, because the suit is in effect against the state, and the dental board itself is exempt from suit. The purpose of the statute in requiring the consent of the prosecuting attorney to the employment of private counsel to assist in prosecutions for violations of the dental act is manifest. Under the law the prosecuting attorney is charged with the duty of prosecuting all violations of the criminal laws of the state, and the legislature did not deem it wise or proper to permit private counsel to intervene or interfere in such prosecutions, without the consent of the regular prosecuting officer. The same rules apply to the employment of private counsel by individuals. But the authority of the dental board to employ private counsel is not dependent upon the consent of the prosecuting attorney, any more than the authority of a private person depends on the like consent. Furthermore, if the respondent assisted in such prosecutions, the consent of the prosecuting attorney will necessarily be implied. We do not concede for a moment that the absence of such allegation from the complaint would defeat the judgment in a collateral proceeding, as we are of the contrary opinion. The original action was in no sense a suit against the state. The state is not bound by the judgment, nor are any of the state's funds charged with its payment. The claim that the dental board is exempt from suits by individuals is likewise untenable. Boards, commissions and bodies created by legislative authority have

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an incidental capacity to sue and be sued, independently of any express power, and for that purpose are to be regarded as corporations *sub modo*. *Clarissey v. Metropolitan Fire Department*, 1 Sweeney (N. Y.) 224.

The contention that the remedy of respondent is by writ of mandamus is based on Bal. Code, §§ 5676 and 5755 (P. C. §§ 1358, 1407). The former section provides the manner of enforcing judgments against counties, incorporated towns, school districts, and other public corporations of like character in this state. The mode prescribed is to present a certified transcript of the docket of the judgment to the officer of the county or other public corporation who is authorized to draw orders on the treasurer thereof. This section only applies to such public corporations as pay claims and demands against them by orders or warrants drawn on the treasurer. Under Bal. Code, § 9031, the State Dental Board handles its funds and satisfies claims and demands against it the same as any individual, copartnership or private corporation. It does not pay by orders or warrants, and is not a public corporation of like character as those above specified. Section 5755 is the general statute relating to writs of mandamus. Perhaps a writ of mandamus would lie here, as the scope of the common law writ has been greatly extended in this state, but if we concede that the respondent had a remedy by mandamus, that remedy is concurrent and not exclusive.

The remaining question is, was the court without jurisdiction to appoint a receiver. We can discover no objection to the receivership on jurisdictional grounds. The funds in the hands of the dental board are not public funds in any sense of the word. They are not covered into the state treasury, nor does the board receive any funds from the state. The funds received and collected by it are used by the members to pay their per diem and defray the traveling and other expenses incurred by them, and are under the exclusive con-

trol and dominion of the board. If the members of the board refuse to apply the funds coming into their possession in satisfaction of claims judicially established against the board, in our opinion a receivership is a proper mode to attain that end. *Cheek v. Tilley*, 31 Ind. 121, was an action by a deputy clerk on a contract with his principal, providing that the deputy should receive one-half the fees of the office in compensation for his services. And in such action it was held that an injunction and a receivership to collect the fees pending the litigation was proper, and that such relief in no manner interfered with the operations of government or with the defendant's official duty. See, also, *High, Receivers*, p. 25, § 22.

In our opinion the respondent's judgment is valid, and the court acted within its jurisdiction in the appointment of the receiver, and these being the only questions presented by the appeal, the judgment is affirmed.

HADLEY, C. J., DUNBAR, FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

[No. 6895. Decided July 17, 1908.]

AMERICAN BONDING COMPANY, *Respondent*, v. S. S. LOEB,
Appellant.¹

PLEDGES—PLEDGE OF CORPORATE STOCK—FORECLOSURE—MERGER OF LIEN—ENFORCEMENT OF DECREE—CUSTODY OF PLEDGED CERTIFICATE. Where a pledgee of a certificate of stock in a corporation has reduced its claim to judgment, foreclosing its lien on and directing a sale of the stock, its lien is merged in the judgment, and it is not entitled to possession of the certificate of the stock, but only to have the judgment carried into execution, and the only right of the pledgor is the right of redemption; the clerk of the lower court being the proper custodian of the certificate until redemption or sale.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered May 28, 1907, upon findings in

¹Reported in 96 Pac. 692.

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Opinion Per Curiam.

favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a pledge. Affirmed.

Richard Saxe Jones, for appellant.

Campbell & Powell, for respondent.

ON PETITION FOR REHEARING.

PER CURIAM.—On the 27th day of March, 1908, application was made to this court by the respondent for leave to withdraw the original certificate for 100 shares of the capital stock of the Pacific Brewing & Malting Company from the records and files of this court, substituting a copy in lieu thereof. The appellant appeared on the hearing of this motion and asked that the statement of facts and all exhibits in the case be returned to the clerk of the lower court, to the end that the final judgment might be carried into execution as directed by this court. On the hearing of these motions, the application of the appellant was granted and the application of the respondent denied, without an opinion. A rehearing has been asked for, and in view of the fact that there seems to be a misunderstanding between counsel as to the effect of the court's decision, or the reasons upon which it was based, we deem it proper at this time to state briefly our reasons for the order then made. The facts in the case are thus briefly stated in the opinion filed on the hearing of the appeal:

"One A. L. Campbell was an agent of the respondent, American Bonding Company, and issued a bond in behalf of the respondent for a charter party entered into by Saunders, Ward & Co., and took security back from Saunders, Ward & Co. The appellant, Loeb, was a member of the transportation company for whose benefit the first bond was given. He became an officer of the transportation company to whom the charter party of the schooner Aberdeen was assigned, and said schooner was operated by said company. Twenty-five thousand dollars of the par value of the capital stock of said

company was delivered to the appellant, Loeb, and afterwards sold by him for a valuable consideration. Loeb deposited 100 shares of the capital stock of the Pacific Brewing & Malting Company as collateral security to protect the bonding company from loss on the bond furnished by it. The transportation company unsuccessfully conducted its business, and failed. Action was brought on the bond against the American Bonding Company, in San Francisco, Cal., and judgment rendered thereon, and this action is brought by the bonding company to foreclose the right of all parties to the shares of the capital stock of the Pacific Brewing Company deposited as aforesaid. Upon the hearing of the case, judgment was entered in favor of the bonding company, from which judgment this appeal is taken." *American Bonding Co. v. Loeb*, 47 Wash. 447, 92 Pac. 282.

From the foregoing statement it will be seen that the original action was instituted to foreclose a lien on the shares of stock now in controversy, and the stock certificate was filed as an exhibit on the trial. The final judgment of the court granted a foreclosure of the lien and directed a sale of the stock to satisfy the judgment. This judgment was affirmed on appeal to this court. *American Bonding Co. v. Loeb*, *supra*.

The contention of the respondent seems to be that, notwithstanding the fact that it has foreclosed its lien and reduced its claim to judgment, it nevertheless has a right to the possession of the certificate of stock to do with as it wills, until the certificate is redeemed by the appellant. With this contention we are unable to agree. The claim of the respondent has been reduced to judgment and whatever rights it may originally have had in the shares of stock as pledgee are now merged in that judgment. It has no more right to withdraw the certificate at this time than it would have to withdraw a promissory note or mortgage after judgment for the purpose of negotiating it. The only rights it now has in the certificate or the stock is the right to have the judgment of the court carried into execution, and it is not entitled to the

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possession of the stock certificate for that purpose. For these reasons the motion of the respondent is denied.

The only right the appellant has in the stock certificate, on the other hand, is the right of redemption. The time or manner of carrying the judgment into execution rests entirely with the respondent in whose favor the judgment was given. In returning the record to the superior court from which it came, we do not accede to any of the contentions made by the appellant before this court. We simply deemed the clerk of the lower court the proper custodian of the certificate until redeemed or sold under the decree.

The rehearing is therefore denied.

[No. 7354. Decided July 18, 1908.]

A. M. MATTHEWS *et al.*, *Respondents*, v. THE CITY OF
SPOKANE, *Appellant*.¹

APPEAL — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE. Where the dangerous and defective condition of a sidewalk was testified to by numerous witnesses and in no manner disputed, it is harmless error to admit as exhibits broken pieces of the walk not sufficiently connected with the place of the injury.

SAME. It is harmless error to receive evidence tending to show notice by a city of the defective condition of a sidewalk after counsel had admitted that the city had notice.

MUNICIPAL CORPORATIONS—CLAIMS—VERIFICATION — HUSBAND AND WIFE—COMMUNITY PROPERTY. A claim against a city for a personal injury to a wife may be verified by the husband alone, as it is community property.

APPEAL—REVIEW — DISCRETION — TRIAL — SUBMISSION OF SPECIAL VERDICT. The submission of special interrogatories to the jury rests entirely with the trial court, and its refusal is not subject to review.

TRIAL—RECEIVING VERDICT. Error cannot be assigned on the action of the court in sending the jury back with the pleadings, to cure an oversight in not sending the same to the jury room, after the

¹Reported in 96 Pac. 827.

verdict had been read but before it was received or filed, where the jury presently returned with the same verdict, which was received and filed.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A judgment for personal injuries will not be held excessive on appeal, where two different juries and the court had approved the amount and were in a much better position than the supreme court to judge of the nature and extent of the injuries.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 7, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

L. R. Hamblen, F. D. Allen, and Harry A. Rhodes, for appellant.

Nuzum & Nuzum and Alex M. Winston, for respondents.

RUDKIN, J.—On the morning of July 6, 1907, the plaintiff Mildred A. Matthews was walking along the sidewalk on one of the public streets of the city of Spokane, accompanied by her sister and her husband. The husband stepped on the end of a loose plank in the walk, and the opposite end flew up; Mrs. Matthews stepped into the hole thus left in the walk, and received the injury for which a recovery was sought in this action. The case was tried before a jury, and from a judgment in favor of the plaintiffs, the defendant has appealed.

The appellant has assigned a great many errors in its brief, but all assignments relating to the same general subject have been discussed under a single head, and we will pursue the same course. One of the witnesses for the respondents produced at the trial two planks, a piece of stringer, and some decayed pieces of boards, taken from the walk at or near the place of the accident, some few days after the injury occurred. The admission of these several pieces in evidence, the refusal of the court to strike them from the

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record, and the refusal of the court to instruct the jury to disregard them and the testimony relating thereto, form the subject of several of the assignments. The ground of objection to the admission of this testimony and the several rulings of the court in connection therewith is that the planks and other material were not sufficiently connected with the place of the injury to render them competent. We are inclined to the opinion that these several items of evidence were sufficiently connected with the place of the injury to render them competent, but that question we do not feel called upon to determine. The dangerous and defective condition of the sidewalk was testified to by numerous witnesses, including sidewalk inspectors of the city. This testimony was in no manner contradicted or disputed, as the appellant offered no testimony, except as to the nature and extent of the injury complained of. While there was no formal admission as to the defective and dangerous condition of the sidewalk, yet its condition can scarcely be said to have been an issue in the case, and we do not think that the several rulings complained of were prejudicial even if erroneous.

Several other assignments relate to the admission in evidence of reports made to the city by certain of its officers, showing the defective condition of the walk; the admission in evidence of a notice given by the city to the abutting property owner to repair or rebuild the walk, and the admission in evidence of an agreement with the board of public works of the city extending the time for repairing or rebuilding the walk. The principal objection to this class of testimony is based on the ground that the appellant admitted in open court before the jury that it had notice of the condition of the walk, whatever the testimony might show that condition to be, and that testimony tending to show notice was for that reason incompetent and immaterial. The necessity for offering such proof in the face of the admission made by the appellant is not apparent, but testimony which would have

been competent and admissible in the absence of the admission of counsel was not rendered prejudicial or incompetent by reason of such admission.

Several assignments are also based on the admission in evidence of the claim filed with the city counsel and on the rulings of the court in connection therewith. The claim was duly verified by the husband and appeared on its face to have been verified by the wife also, but the testimony tended to show that the claim was not in fact sworn to by the wife. A claim for damages for personal injury to the wife is community property and the verification of the claim by the husband alone is sufficient. *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808.

The refusal of the court to submit special findings or a special verdict to the jury is next assigned as error. Such matters rest entirely within the discretion of the trial court, and its rulings are not subject to review on appeal. *Bailey v. Tacoma Traction Co.*, 16 Wash. 48, 47 Pac. 241.

At the close of the trial the court, through an oversight, failed to send the pleadings to the jury room. This omission was discovered after the jury had reached their verdict and after the verdict had been read, but before the verdict was received and filed in court. The court, as a matter of precaution, sent the jury out again with the pleadings. The jury presently returned into court with the same verdict, which was received and filed. Several assignments are based on the action of the court in this regard, and upon comments made by the court in this connection. These assignments are entirely without merit and we need not discuss them.

It is lastly contended that the verdict is excessive. The case has been tried before two different juries with the same result; the trial court and jury saw the injured party and heard her testimony, as well as the testimony of the other witnesses; they were in a much better position to judge of the

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nature and extent of the injury and of the weight of the testimony than is this court, and we would not be warranted in disturbing their conclusions under the showing made.

The judgment of the court below is therefore affirmed.

HADLEY, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7386. Decided July 18, 1908.]

RITZVILLE HARDWARE COMPANY, *Respondent*, v. W. J. BENNINGTON *et al.*, *Appellants*.¹

EXECUTION—EXEMPTIONS—HOMESTEAD—PUBLIC LANDS. The proceeds of a Federal homestead are not exempt from execution, under a claim that the homesteader is the head of a family and intends to use the proceeds in the acquisition of a new homestead to be owned and occupied by him under the laws of the state; since Bal. Code, §§ 5219 and 5247, permitting the sale of a homestead free from liens and the acquisition of a new homestead with the proceeds applies only to the state exemptions of a certain value; the Federal exemption from pre-existing debts being but a condition of the grant, irrespective of state exemption laws or value, and not applying to proceeds of a sale (Root, J., dissenting).

Appeal from a judgment of the superior court for Adams county, Zent, J., entered October 28, 1907, upon findings in favor of the plaintiff, against a garnishee defendant, after a trial on the merits before the court without a jury. Affirmed.

O. R. Holcomb, for appellants.

Adams & Naef, for respondent.

RUDKIN, J.—The Ritzville Hardware Company brought an action against D. F. Johnston on a money demand and sued out a writ of garnishment against one W. J. Bennington. Both the garnishee and the principal defendant made answer to the writ, admitting that the garnishee had in his possession and under his control at the date of the service

¹Reported in 96 Pac. 826.

of the writ the sum of \$1,218.70 belonging to the principal defendant, and averring that the money so held was derived from the sale of a homestead acquired by the principal defendant under the homestead laws of the United States; that the principal defendant intended to use the money so held in the acquisition of a new homestead, to be owned and occupied by him under the laws of the state; that the principal defendant is the head of a family, etc. The cause was heard on the issues thus presented, and from a judgment directing the garnishee to pay over sufficient of the funds in his hands to satisfy the judgment in the principal action, this appeal is prosecuted.

In *Becher v. Shaw*, 44 Wash. 166, 87 Pac. 71, we held that, where a homestead exempt under the laws of the state is sold, the proceeds of the sale are exempt from garnishment for a reasonable time while in transition from the homestead sold to another purchased. This conclusion was based on Bal. Code, §§ 5219 and 5247 (P. C. §§ 5461, 840), which permit of the sale of a homestead free from liens and encumbrances, and the acquisition of a new homestead with the proceeds, which shall likewise be free from execution or attachment. We do not think that this rule can be extended to embrace or include proceeds arising from the sale of a Federal homestead. While § 2296 of the United States Revised Statutes declares that: "No lands acquired under this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issue of the patent therefor," such exemption is not founded upon any state law or state policy. The Federal exemption exists whether the claimant is the head of a family or not, and whether the land is occupied as a home or not; it exists regardless of the value of the homestead, or the value of any other property the claimant may own, and regardless of the fact that the claimant may own and occupy another homestead exempt under state laws, and the exemption only exists as against debts

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contracted prior to a certain date. Indeed, the exemption created by the act of Congress has never been looked upon as a homestead exemption at all. It is in the nature of a condition attached to the grant, in virtue of the power of the Federal government relating to the primary disposal of the soil, rather than in virtue of any police power vested in that government. *Jean v. Dee*, 5 Wash. 580, 32 Pac. 460; *Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 213; *Duell v. Potter*, 51 Neb. 241, 70 N. W. 932. And the Federal exemption ceases as soon as the land is voluntarily disposed of by the homesteader. It does not extend to the proceeds of the sale. *McIntosh v. Aubrey*, 185 U. S. 122, 22 Sup. Ct. 561, 46 L. Ed. 834; 18 Cyc. 1440.

The funds sought to be garnished were therefore not exempt by virtue of any act of Congress, nor were they exempted expressly or by implication by any law of the state. Such having been the conclusion of the court below, its judgment is affirmed.

FULLERTON, CROW, and DUNBAR, JJ., concur.

ROOT, J., dissents.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7239. Decided July 23, 1908.]

SIMEON S. JOHNSON *et al.*, *Appellants*, v. EUGENIA S.
BARTLETT *et al.*, *Respondents*.¹

MORTGAGES—FORECLOSURE—CONFIRMATION—EFFECT. Confirmation of a mortgage foreclosure sale, regularly made, under a decree regular on its face and reciting service on all the defendants, cures defects in the matter of publishing the notice of sale.

ADVERSE POSSESSION—COLOR OF TITLE—GOOD FAITH—MORTGAGES—REDEMPTION—LIMITATIONS. A certificate of sale and sheriff's deed, executed in legal form and confirmed, constitute color of title, within Bal. Code, § 5503, providing for title by adverse possession and the payment of taxes for seven consecutive years under claim and color of title made in good faith; and such possession and payment of taxes bars an action to redeem from the mortgage based on the invalidity of the foreclosure decree and sale.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered June 29, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to redeem from a real estate mortgage. Affirmed.

Peacock & Ludden, for appellants.

Happy & Hindman, for respondents.

CROW, J.—This action was instituted by Simeon S. Johnson, Linnie Johnson, his wife, and Solomon Cameron, against Eugenia S. Bartlett, T. Harris Bartlett, her husband, and Eleanor B. Ogden, defendants, for an accounting and to redeem certain real estate from an alleged mortgage lien. The plaintiffs, claiming themselves to be the owners of the fee simple title, alleged that a certain foreclosure proceeding under which the defendants claim title is void; that the defendants are mortgagees in possession, and that the plaintiffs are entitled to the property upon discharging the mortgage lien. The defendants pleaded title in T. Harris Bartlett under the

¹Reported in 96 Pac. 833.

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foreclosure proceedings, and by adverse possession. From a judgment quieting his title, the plaintiffs have appealed.

The appellants contend that the trial court erred in its findings made, in refusing findings requested, in its conclusions of law, and in entering the final decree. The evidence shows, and the trial court found, that on March 3, 1890, the appellants Simeon S. Johnson, Linnie Johnson, his wife, and Solomon Cameron, a single man, executed and delivered to one James P. Bartlett, now deceased, two promissory notes for the sum of \$6,000; that to secure their payment they also executed and delivered to James P. Bartlett their mortgage deed of that date, on certain real estate which they owned in the city of Spokane, the same being the real estate in dispute in this action; that on November 13, 1894, the sum of \$3,000 and interest being past due and unpaid, James P. Bartlett, as plaintiff, commenced in the superior court of Spokane county an action of foreclosure of his mortgage, wherein Simeon S. Johnson, Linnie Johnson, his wife, Solomon Cameron and others were defendants; that personal service was made on all of the defendants therein; that on January 4, 1895, after default by Johnson and wife but prior to default by Cameron, the plaintiff, James P. Bartlett, caused foreclosure judgment and decree to be entered against all the defendants, including Cameron, for \$3,317.50 debt, \$300 attorney's fees, and costs of suit; that on the same date an execution and order of sale was issued, under which the sheriff of Spokane county, on February 8, 1895, sold the property to James P. Bartlett for \$2,500, leaving a deficiency of \$1,194.79; that a return of this sale was made and filed; that no confirmation thereof was asked or had; that no sheriff's deed issued thereon; that afterwards, on June 12, 1895, James P. Bartlett, having discovered his judgment had been prematurely entered as against the defendant Solomon Cameron, caused an amended judgment and decree to be entered against all of the defendants, for \$3,317.50, with interest from January 4, 1895, the date of the

former decree, and for \$300 attorney's fees and costs; that this second decree, after making reference to and setting forth the former decree, recited that it was void as to the defendant Solomon Cameron for the want of service upon him prior to its entry; that upon the amended decree an execution and order of sale was issued under which the sheriff of Spokane county, on July 15, 1895, again sold the real estate to James P. Bartlett for \$2,500, leaving a deficiency of \$1,309.05; that the second sale was confirmed by order of court; that a certificate of sale was issued to James P. Bartlett; that on November 7, 1896, the sheriff of Spokane county, Washington, executed and delivered to Frances M. Bartlett, widow and successor in interest of James P. Bartlett, then deceased, a deed for the real estate; that Frances M. Bartlett died in August, 1897; that the respondent T. Harris Bartlett, her son, obtained title by descent from her and by deeds from her other heirs; that the respondent T. Harris Bartlett is now the owner of the real estate; that he and his predecessors in interest have been continually in quiet and peaceful possession since July 15, 1895, in good faith, holding and claiming title under such foreclosure proceedings, and that they have paid all taxes during such period.

The evidence shows that, although personally served with summons, neither Simeon S. Johnson nor Linnie Johnson, his wife, nor Solomon Cameron, appeared in the foreclosure proceedings, and that none of them ever attacked its validity at any time prior to January 30, 1907, the date of the commencement of this action. The evidence further shows that on January 7, 1901, the respondent T. Harris Bartlett executed and delivered to the respondent Eugenia S. Bartlett, his wife, an instrument which, although in form a warranty deed for the real estate, was in fact a mortgage executed for the purpose of securing a loan of \$4,000. Relying on this deed; the appellants asked a finding, which the trial court refused, to the effect that the respondent T. Harris Bartlett

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was not the owner of the real estate, but that he had made an absolute conveyance to his wife, the respondent Eugenia S. Bartlett. We conclude that this requested finding was properly refused. The joint answer of the defendants T. Harris Bartlett and Eugenia S. Bartlett alleged title and ownership in T. Harris Bartlett, and the undisputed evidence sustains their contention that the deed above mentioned was a mortgage, and that whatever title or interest was derived from the foreclosure proceeding is equitably vested in the respondent T. Harris Bartlett.

The substance of appellants' contentions seems to be, that the original judgment was partially satisfied by the first sale, without credit being given therefor; that the second or amended decree was void, as it was entered without notice to the appellants Johnson and wife; that the sheriff did not publish notice of the second sale for the entire time required by the statute; that the second sale, which was made under the amended decree, was void; that the respondents, holding under such void foreclosure and sale, are mortgagees in possession against whom the statute of limitations has not run, and that the appellants are, therefore, entitled to an adjudication of the amount due on the mortgage, are further entitled to redeem by making payment of the amount so found to be due, and recover possession after making such redemption. Respondents contend that the amended decree and foreclosure sale are valid; that the decree recites legal service upon all of the defendants, and cannot be attacked in this collateral proceeding; that the respondent T. Harris Bartlett holds a valid title under the foreclosure decree; that he has in any event obtained title by adverse possession under the seven-year color-of-title statute [Bal. Code, § 5503 (P. C. § 1160)], and also under the ten-year statute of limitations [Bal. Code, § 4797 (P. C. § 280)].

It is not necessary for us to pass upon the validity or invalidity of the amended decree under which the second sale was made. An examination shows it to be regular upon its

face, and that it recites service on all the defendants without stating the respective dates on which such service was made. The foreclosure sale was regularly made and confirmed. Confirmation cured any alleged defects in the matter of publication of notice. The certificate of sale and the sheriff's deed, afterwards executed in legal form and delivered in pursuance of such confirmed sale, were certainly color of title under which, in contemplation of §5503, *supra*, the respondent T. Harris Bartlett and his predecessors in interest have been in actual, open, and notorious possession, and have in good faith claimed title, and paid taxes for more than seven successive years prior to the commencement of this action. *Philadelphia Mortgage & Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501; *Olson v. Howard*, 38 Wash. 15, 80 Pac. 170; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005.

Assuming that, in a proper action, commenced within the statutory period, it might have been shown that the amended decree for want of notice was void, and that the respondent T. Harris Bartlett and his predecessors in interest were by reason thereof mortgagees in possession against whom, on authority of *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625; *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949; *Sawyer v. Vermont Loan & Trust Co.*, 41 Wash. 524, 84 Pac. 8, and other cases decided by this court, the statute of limitations did not run, the appellants are nevertheless barred from making any such a showing in this action or at this time.

The vital question for our consideration is, not whether the six-year statute of limitations has run against the mortgage notes equitably assigned by a void foreclosure to respondent T. Harris Bartlett as mortgagee in possession, but whether the seven-year statute, § 5503, *supra*, has run against the appellants who are now prosecuting this action. At the time respondent's predecessors in interest took possession, they in good faith held and claimed under the certificate of sale, which constituted color of title in contemplation of

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§ 5503, *supra*. That statute then commenced to run in their favor. The evidence shows that it had completely run against the appellants prior to commencement of this action. The trial court correctly held that the respondent T. Harris Bartlett was entitled to a decree quieting his title.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, and MOUNT, JJ., concur.

[No. 7363. Decided July 23, 1908.]

A. A. MACK *et al.*, Appellants, v. HOWARD B. DOAK, as
Sheriff of Spokane County *et al.*, Respondents.¹

CHattel Mortgages—FORECLOSURE—SEIZURE BY SHERIFF—AUTHORITY—NOTICE—CONVERSION. Under Bal. Code, § 5872, providing that the notice of a chattel mortgage foreclosure shall be sufficient authority for the sheriff to take possession of the property, a sheriff is not guilty of conversion in seizing the mortgaged property under a proper notice and proceedings complying with the statute, although against the protests and objections of the mortgagors, where the mortgagors did not contest the amount due or take any steps to secure a transfer of the foreclosure to the superior court, pursuant to Bal. Code, § 5876.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered January 23, 1908, in favor of the defendants, upon the pleadings and plaintiffs' opening statement to the jury, dismissing an action for conversion. Affirmed.

J. F. Blake and Harris Baldwin, for appellants.

R. M. Barnhardt, Geo. A. Lee, and W. W. Tolman, for respondents.

Crow, J.—Action by A. A. Mack and Frank Davis, co-partners as Mack & Davis, against Howard B. Doak, as sheriff of Spokane county, and the National Surety Company,

¹Reported in 96 Pac. 825.

a corporation, as surety on his official bond, to recover damages for the wrongful conversion of personal property. After plaintiffs' opening statement to the jury, the defendants moved the court for a judgment thereon and on the pleadings. This motion being sustained, final judgment was entered in favor of the defendants, from which the plaintiffs have appealed.

The only assignment of error is that the trial court erred in sustaining the respondents' motion and dismissing the action. The pleadings and opening statement show, that appellants were conducting a restaurant and saloon business in the city of Spokane; that they owned and were in the possession of certain furniture, fixtures, utensils, and other personal property which they used as an equipment in their business; that on May 22, 1907, they executed and delivered to the Continental Distributing Company, a corporation, a promissory note; that to secure its payment they also executed, in due and legal form, and delivered to the Continental Distributing Company their chattel mortgage on the personal property above mentioned; that claiming default in payment, the Continental Distributing Company, on July 6, 1907, instituted foreclosure proceedings by placing in the hands of respondent Howard B. Doak, as sheriff of Spokane county, a written notice which in all respects conformed to the requirements of Bal. Code, § 5871 (P. C. § 6536); that thereupon respondent as such sheriff served the notice and took possession of the personal property therein described, against the protest and objection of the appellants; that he thereafter took all steps required by the statute for the foreclosure of such mortgage by notice and sale; that at the foreclosure sale the property was purchased by the Continental Distributing Company; that the appellants' business was interrupted and destroyed, and that they claimed damages for the value of the property taken and for the loss of business profits.

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There is no contention that, after the respondent sheriff had thus taken possession, the appellants or either of them took any action under Bal. Code, § 5876 (P. C. § 6541), to question the right of the mortgagee to foreclosure, to contest the amount claimed to be due, to cause the proceedings to be transferred to the superior court, or to obtain any order of injunction. The substance of appellants' contention seems to be that the sheriff had no authority, under the notice delivered to him by the mortgagee, to seize the personal property against their objection and protest; that it was necessary for the mortgagee to resort to some action in the nature of replevin, to secure possession, and that the acts of the sheriff in forcibly seizing the property against appellants' protest was so wrongful and tortious as to render him and the surety upon his official bond liable to appellants for damages sustained. In other words, they contend that the notice mentioned in § 5871, *supra*, was not such process as would authorize the sheriff to seize the property, or protect him in making such seizure against their protest.

In support of this contention they cite and rely upon *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062. That case does not sustain them in their position. There a mortgagee commenced foreclosure by equitable action and delivered the complaint and summons to the sheriff for service. Without further authority or process, the sheriff forcibly seized possession of the personal property against the protest and objection of the mortgagor. This court sustained an instruction to the effect that, without the consent of the mortgagor, the sheriff had no right under the summons and complaint to seize the mortgaged property, as their only purpose was to notify the defendant of the commencement and pendency of the action. Had the plaintiff desired to obtain possession of the property without the consent of the defendant, it was obligatory upon him in such equitable action to procure other process for that purpose. He did not do so, and the sheriff for exceeding his lawful authority was held liable for conversion.

The foreclosure here involved was commenced and conducted by notice and sale in exact compliance with the requirements of Bal. Code, §§ 5870-5875 (P. C. §§6535-6540). Section 5870 provides that foreclosure may be made by notice and sale; § 5871 directs what the contents of the notice shall be, and § 5872 expressly provides that such notice shall be sufficient authority for the sheriff to take the property into his immediate possession. This provision makes the notice process sufficient to authorize the sheriff to seize the property without the consent of the mortgagor, and against his protest. Any other construction would render the statute ineffective. Section 5876, *supra*, provides a method by which the mortgagor may protect himself against an unauthorized foreclosure, or contest the amount claimed to be due. The appellants did not see fit to avail themselves of the provisions of this section, but permitted the foreclosure and sale to proceed without further protest or action upon their part, and thereafter commenced this action for damages. Under these circumstances, the sheriff was fully protected in all of his proceedings by the notice which had been delivered to him, and the appellants are not entitled to recover.

The judgment is affirmed.

RUDKIN, FULLERTON, and DUNBAR, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7122. Decided July 28, 1908.]

SEATTLE CEDAR LUMBER MANUFACTURING COMPANY,
Respondent, v. THE CITY OF BALLARD *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS—SEWERS—ASSESSMENTS—STATUTES—IMPLIED REPEAL. Where the original charter and former statutes relating to sewers of cities of the third class provided that the cost should be paid by the city out of the sewer fund, and by Laws 1891, p. 406, special assessment of property benefited was authorized in cities of the 2nd, 3rd, and 4th classes, the proceeding to be initiated by petition of persons owning half of the property, and the lien enforced by a summary sale, all the prior laws so far as they related to sewers of cities of the third class are impliedly repealed by Laws 1903, p. 231, which specifically amends the charters of cities of the third class and provides for special assessments to be initiated by resolution or ordinance of the city council and enforced by an action of foreclosure; as they are inconsistent, and the intent to supersede prior laws is clear, although they are not expressly repealed.

SAME—ASSESSMENTS—VALIDITY—JURISDICTIONAL DEFECTS—CURATIVE STATUTES. Laws of 1905, p. 281, which provides that no special assessment can be set aside unless it be made to appear that the city authorities acted fraudulently, will be construed, in order to uphold its constitutionality, to reach only irregularities and not jurisdictional matters; hence the law of 1905 does not prevent the setting aside of an assessment void for want of jurisdiction; and failure to substantially follow the established statutory method is essentially a jurisdictional defect, rendering an assessment void.

JUDGMENT—ON PLEADINGS—ADMISSIONS IN ANSWER. Where affirmative defenses show that plaintiff is entitled to the relief demanded and defendants refused to plead further after demurrer to the defenses are sustained, judgment may be entered for the plaintiff without the taking of proofs upon formal denials of the answer.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 22, 1907, in favor of the plaintiff, upon sustaining a demurrer to the affirmative answer, in an action to enjoin the collection of a special assessment for a local improvement. Affirmed.

¹Reported in 96 Pac. 956.

Scott Calhoun and Howard A. Hanson, for appellants.

Peters & Powell, for respondent.

HADLEY, C. J.—This is an action to enjoin the city of Ballard and the city marshal thereof from collecting, or attempting to collect, a special assessment for the construction of a sewer. The plaintiff is the owner of real estate which was assessed for said improvement in the aggregate sum of \$746.67. It is conceded by the defendants that the city proceeded in accordance with chapter 160 of the Laws of 1891, p. 406, entitled: "An Act to provide for the drainage of cities of the second, third and fourth class, by the construction of sewers and drains." It is contended by the defendants that the procedure was also authorized by chapter 126 of the Laws of 1899, p. 244, entitled: "An Act authorizing cities and towns, other than cities of the first class, to construct sewers and drains within assessment districts, and to levy and collect special assessments and taxes to pay therefor, and declaring an emergency." And also by chapter 27 of the Laws of 1903, p. 30, entitled: "An Act to amend section two (2) of an act entitled 'An act authorizing cities and towns, other than cities of the first class, to construct sewers and drains within assessment districts, and to levy and collect special assessments and taxes to pay therefor, and declaring an emergency,' approved March 14, 1899." The plaintiff's position is that all legislation upon the subject, so far as cities of the third class are concerned, was superseded by chapter 124 of the Laws of 1903, p. 231. The facts with regard to the method of procedure were set up by way of answer to the complaint, and the plaintiff thereupon demurred to the affirmative answer. The demurrer was sustained, and the defendants declining to plead further, judgment was entered declaring the assessment void and restraining the defendants from collecting or attempting to collect it. The defendants have appealed.

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The real contention on the appeal is whether chapter 124 of the Laws of 1903 has superseded all other legislation upon the subject of sewer construction in cities of the third class. The lower court held that it has. The first legislation upon the subject is found in Laws of 1890, p. 187, § 124. That section was a part of the charter adopted in 1890 for all cities of the third class. It provided for payment of the expense of making and repairing sewers out of the sewer fund, which fund was sustained by general taxation. The next legislation was that found in chapter 160 of the Laws of 1891, which was an act to provide for the construction of sewers in cities of the second, third, and fourth classes. That act authorized the establishment of sewer districts and the special assessment of property benefited. The procedure as there outlined is initiated by a petition signed by persons owning a majority of the land to be included in the district, and it is concluded after the intermediate steps by a summary sale of the property by the city marshal as the means of enforcing collection. The next statute bearing upon the subject is that of § 5, p. 159, of the Laws of 1893, chapter 70. It will be seen that the section is an amendment of § 124 of the act of 1890, which related to cities of the third class only, and this act of 1893 still declares that the expense of making and repairing sewers in cities of the third class shall be paid by the city out of the sewer fund. The next statute is that of chapter 126 of the Laws of 1899, which authorizes the establishment of assessment districts for sewer construction in cities and towns other than those of the first class, and provides for payment by the installment and bond method. The next statute is that of chapter 113 of the Laws of 1901, p. 229, which is entitled as follows: "An Act amending section 943 of Ballinger's Codes and Statutes of Washington, relating to assessments for local improvements." Section 943 of Bal. Code (P. C. § 3495), which is specifically amended by this statute of 1901, is the original section 124 of the statute of 1890 heretofore mentioned as a part of the original char-

ter for cities of the third class. This statute of 1901 still declares that the expense of making and repairing sewers shall be paid by the city out of the sewer fund. The next statute is that of chapter 27 of the Laws of 1903, which provides for special assessments for sewer construction in cities and towns other than those of the first class. There is nothing further concerning said statute that is pertinent here. The last legislation upon the subject which has been called to our attention is chapter 124 of the Laws of 1903, which was passed and approved subsequent to the passage and approval of said chapter 27 at the same session. This last statute, chapter 124 of the Laws of 1903, specifically amends said § 943 of Bal. Code, which relates to cities of the third class only.

It will be seen from the foregoing review that every statute (prior to the last one) which provided for special assessment districts included other cities as well as those of the third class. In 1890, 1893, and 1901 the legislation related to cities of the third class only, and each time it was provided that the making and repairing of sewers should be paid by the city out of the sewer fund. The next statute relating exclusively to cities of the third class is that of chapter 124, Laws of 1903, and by it the original statute in the charter of the cities of the third class is so amended that special assessments are expressly authorized. The method of effecting the assessment and collection as outlined is initiated by resolution or ordinance of the city council, declaring its intention to construct the improvement, followed by another ordinance, after notice and hearing of protests, establishing an assessment district, and the collecting procedure is concluded by a suit to foreclose in accordance with the provisions of the code of civil procedure. It is the contention of appellants that this statute is not inconsistent with that of 1891 heretofore cited, and that inasmuch as the former statute is not expressly repealed by the later one, it is still in force and the city may proceed thereunder. We think the two statutes are by no

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means consistent. The initiation of the procedure and the steps thereof respectively differ in essential particulars throughout, the former concluding by summary sale of the property and the latter by suit to foreclose. We think that, so far as the subject of sewer construction in cities of the third class is concerned, chapter 124 of the Laws of 1903 must be held to have repealed by implication the statute of 1891. We also think that said chapter was clearly intended to supersede all former statutes upon the subject of sewer construction in cities of the third class.

It is further contended that the court erred in holding the assessment void by reason of chapter 150 of the Laws of 1905, p. 281. It is contended that, under that statute, no special assessment can be set aside unless it is made to appear that the city authorities acted fraudulently and without good faith. If that statute had been intended to reach beyond mere irregularities and to include jurisdictional matters, we think it would necessarily have been unconstitutional. In the interest of upholding the validity of the statute we think it must be held that it was not intended to declare that all jurisdictional matters are henceforth immaterial and that any assessment, no matter by what method it is accomplished, shall be upheld unless the city authorities have acted fraudulently. If such were the intention of the statute and if it could obtain, then no uniform method of procedure would be needed. Any one of say a hundred or more different methods would have to be upheld unless some fraud were discovered. Such a lax and confusing legislative scheme could not be tolerated in any well regulated community, and we hold that our legislature did not intend such a result. At least a reasonably substantial following of the established statutory method of making public improvements by special assessments is essentially a jurisdictional matter. The failure to proceed under chapter 124 of the Laws of 1903 in the case at bar rendered the assessment void.

Appellants further contend that it was error to enter judg-

ment without taking evidence, for the reason that the answer denied many allegations of the complaint, thus making issues of fact. Appellants' affirmative allegations, however, revealed the invalidity of the assessment. They cannot now assume an inconsistent position and demand a useless trial upon facts which they have formally denied, when their own affirmative averments show that respondent is entitled to the relief asked. A demurrer to these averments having been sustained, and appellants having declined to plead further, the judgment that was rendered properly followed.

The judgment is affirmed.

FULLERTON, CROW, and MOUNT, JJ., concur.

[No. 7236. Decided July 28, 1908.]

FRANK OLSEN, *Respondent*, v. TACOMA SMELTING COMPANY,
Appellant.¹

MASTER AND SERVANT—NEGLIGENCE OF MASTER—DUTY TO WARN—DANGEROUS PLACE. In an action to recover injuries sustained by one employed in a smelter in removing copper bars dropped on a table at irregular intervals by a conveyor, there is sufficient evidence to make a case for the jury, where it appears that the bars weighed about 200 pounds, and were dropped at the rate of two or three a minute, and were not long in view, that the men reached across and dragged the bars from the table by hand, that plaintiff had not previously done such work and was not instructed or warned that the conveyor did not drop the bars at regular intervals, which fact was unknown to the plaintiff, whereby a bar dropped and fell upon plaintiff's hand; since it was the duty of the master to warn him of the irregularity in the movement of the bars, as the same was not apparent and increased the dangers of the place.

SAME—INSTRUCTIONS AS TO ISSUES—PLEADINGS. It is not error to instruct the jury that a complaint for personal injuries averred that copper bars fell irregularly, of which fact the plaintiff was not warned, when the complaint only alleged generally that the place was dangerous, where general allegations covered the details stated,

¹Reported in 96 Pac. 1036.

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and where the details were set forth in reply to an answer of assumption of risks, and the irregularity of the movement of the bars was within the issues.

DAMAGES—EXCESSIVE VERDICT—LOSS OF FINGER. A verdict for \$1,500 for the loss of a little finger, resulting in confinement in a hospital for but two hours, is excessive and should be reduced to \$1,000.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered November 4, 1907, upon the verdict of a jury for \$1,500 damages for personal injuries sustained by an employee engaged in removing copper bars from a conveyor. Affirmed on condition of remitting \$500.

John P. Hartman and *E. R. York*, for appellant.

Frank S. Carroll, for respondent.

HADLEY, C. J.—This is a suit to recover damages for personal injuries. Prior to the time of the injury, the plaintiff was employed by the defendant to work at its handle furnace, but on the day of the accident he was called to assist in removing copper bars from a table on which they were being deposited by an electric conveyor. This conveyor was used for removing the bars of copper from one part of the smelter to another. The bars were about forty-two inches long, four inches wide, and four inches thick, and weighed about two hundred pounds. One end of the conveyor was immediately over the table, so that the bars would drop from the conveyor onto the table. The conveyor was above the heads of those engaged in removing the bars from the table, so that the bars could not be seen until a short time before they were ready to drop to the table, some three feet or more below, the table being about two and one-half feet above the floor. The speed of the conveyor was such that it placed upon the table from two to three bars a minute. It ordinarily required the services of two men to remove bars from the table and place them on trucks for the purpose of carrying them away, but as the plaintiff was not at the time busy at his customary station,

he was asked to assist the other two at the table. Of course three men could do the work with greater ease than two. As the men stood in front of the table, they bent forward and reached across to get the bars, which they dragged by their hands across the table toward them. The plaintiff had been assisting at the table but a few minutes when a bar fell on his right hand, causing the loss of his little finger. He alleged in his complaint that he was instructed by the foreman to do the work, but that neither the foreman nor any one else warned him of the dangers of the place where he was working, the danger being in no way visible to him.

The defendant answered that the plaintiff was, both prior to and at the time of the injury, informed of the risks and danger incident to the place where he was working; that the same were open and apparent, and that he assumed the risk of the danger. It was also alleged that the injury was due to plaintiff's contributory negligence. The plaintiff replied that the bars did not drop from the carrier upon the table at regular intervals, and that he was not informed by any one that such was the case. The evidence showed that the allegation as to the dropping of the bars irregularly was true. The cause was tried before a jury, and a verdict was returned for the plaintiff in the sum of \$1,500. From a judgment entered for the amount of the verdict, the defendant has appealed.

It is first insisted that the court erred in refusing to grant a nonsuit, and also in refusing to direct a verdict in favor of the appellant. We think the foregoing statement of the facts shows that the contention in these particulars is not well taken. At best the place was an exceedingly dangerous one, and especially so in view of the manner the men were expected to remove the bars by placing their hands in the place of danger. The fact that the bars were brought up by the conveyor so as to fall upon the table after irregular intervals made the place all the more dangerous. This irregularity constituted a hidden danger of which the respondent should have been carefully warned by appellant. He testified that he received

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no such warning, and that he had no knowledge thereof. The place was so dangerous that any neglect of duty, even the slightest, on the part of appellant, which might have resulted in respondent's injury, should have been submitted to the jury.

It is next assigned that the court erred in its instructions to the jury relative to the pleadings. The court stated that the complaint averred that the bars fell irregularly, of which fact the respondent was not warned. This statement was not strictly accurate, as the subject was not specifically mentioned in the complaint. The complaint did, however, substantially allege that the place was dangerous and that the danger was not visible or known to respondent. The broad allegation as to the dangerous place included the detail as to wherein it was dangerous. Moreover, after appellant had answered that the danger was open and apparent, the respondent replied that it was not so, by reason of the irregularity of the intervals between the deposits of the bars, a thing not known to him and of which he was not warned before he began to work there only a few minutes before. This subject of the irregularity in movement of the bars was, therefore, clearly and properly within the issues, and it was not error to so state it to the jury.

Error is assigned upon the refusal to give a number of requested instructions. We believe no prejudice resulted therefrom. The instructions given we think fairly covered the case.

It is contended that the verdict for \$1,500 is excessive in amount. We think this contention must be sustained. The injury consisted in the loss of a little finger, and the respondent was confined to the hospital but about two hours. Of course, he suffered pain and the hand was disabled for a time; but we believe any amount in excess of \$1,000 is excessive.

The judgment is therefore reversed, and the case remanded with instructions to the trial court to vacate the judgment and, if within thirty days thereafter the respondent shall file

in writing a remittance of \$500 from the verdict, then judgment shall forthwith be entered in his favor for \$1,000; otherwise a new trial shall be granted.

RUDKIN, FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7136. Decided July 28, 1908.]

THE CITY OF SEATTLE, *Respondent*, v. SEATTLE AND
MONTANA RAILROAD COMPANY, *Appellant*.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—VALIDITY. The right of way of an interstate railroad, used for and devoted exclusively to main line trackage purposes, may be assessed for benefits from a local improvement in an assessment district established by commissioners appointed for that purpose, although it is found as a fact that the premises are permanently adapted to railway uses as an approach to a permanent tunnel, and that they will not be actually benefited by the improvement as long as they are devoted to such use, but will be actually benefited in the amounts assessed if and when devoted to any other uses.

SAME—STATUTES—CONSTRUCTION—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS. Laws of 1905, p. 84, § 22, providing that, in assessments for benefits from a municipal improvement, it shall be the duty "of the superior judge" and the commissioners to examine the locality and to estimate the proportion of the total cost that will be of benefit to the property, etc., might be unconstitutional as delegating legislative power to the superior court, if construed literally to require the superior court judge to assist in making the assessment; and the inclusion "of the superior judge" in said action will be held an inadvertence, where it appears that the law viewed as an entirety limited the functions of the court to the appointment of commissioners and a judicial review of the assessment roll; and the law is therefore not invalid as delegating the levying of assessments to the superior court, or to other than the corporate authorities.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 11, 1907, after a hearing on the merits, confirming a special assessment for a municipal improvement. Affirmed.

L. C. Gilman (*R. C. Saunders*, of counsel), for appellant, contended, *inter alia*, that in the absence of a legislative dec-

¹Reported in 96 Pac. 958.

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Citations of Counsel.

laration of benefits, no other ground has ever been sustained by the courts as sufficient to charge property with a special assessment, unless the same is actually benefited. *Boston v. Boston etc. R. Co.*, 170 Mass. 95, 49 N. E. 95; *Allegheny v. Western Pa. R. Co.*, 138 Pa. St. 375, 21 Atl. 763. The United States Supreme Court cases are simply to the effect that a legislative declaration of benefits does not contravene the fourteenth amendment. *Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819. An imagined benefit, contingent upon the happening of a future benefit, is too uncertain, remote and speculative to constitute an "actual" benefit. *Chicago etc. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249; *Naugatuck R. v. Waterbury*, 78 Conn. 193, 61 Atl. 474; *Village of River Forest v. Chicago & N. W. R. Co.*, 197 Ill. 344, 64 N. E. 364; *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279. Legislative, judicial and executive functions must be kept separate as required by the constitution. *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; *State ex rel. Matson v. Superior Court*, 42 Wash. 491, 85 Pac. 264. Laws 1905, ch. 55, purports to delegate legislative powers to the superior court, and imposes upon the judiciary nonjudicial duties. *Houseman v. Kent Circuit Judge*, 58 Mich. 364, 25 N. W. 369; *Hardenburgh v. Kidd*, 10 Cal. 402; *People v. Parks*, 58 Cal. 624; *State ex rel. Spencer v. Ensign*, 55 Minn. 278, 56 N. W. 1006; *State ex rel. Young v. Brill*, 100 Minn. 499, 111 N. W. 294, 639; *Marr v. Enloe*, 9 Tenn. 408, 1 Yerg. 452; *Keesee v. Civil District Board of Education*, 6 Cold. (Tenn.), 127. The act is unconstitutional because it delegates the taxing power to others than the "corporate authorities" of the locality to be affected by the levying of the tax. Const. art. 7, § 9, art. 11, § 12; *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557; *People ex rel. McCagg v. Mayor etc. of Chicago*, 51 Ill. 17; *Harward v. St. Clair etc. Drainage Co.*, 51 Ill. 180; *Hessler v. Drainage Com'rs*, 53 Ill. 105; *Board of Directors v. Houston*, 71

Ill. 318; *Seenor v. Board of County Com'rs*, 18 Wash. 48, 42 Pac. 52.

Scott Calhoun and Ralph S. Pierce, for respondent.

PER CURIAM.—This is an appeal from a judgment of the superior court of King county, confirming an assessment for local improvements against certain lots and parcels of land owned by the Seattle and Montana Railroad Company and occupied by it as a part of its right of way. In support of its appeal, the appellant contends: (1) That the property assessed was not "actually benefited" within the meaning of the act of March 3d, 1905, Laws of 1905, p. 84, under which the assessment was levied; and (2) that that act is unconstitutional. On the question of benefits, the court made the following findings:

"(4) That each and all of said lots and tracts were, at the time of said assessment, and are now, occupied by two main tracks of the Seattle and Montana Railroad Company, which forms a part of the Great Northern Railway System, which system extends through the states of Minnesota, North Dakota, Montana, Idaho, and Washington, and over which there was, at the time said assessment was made, and is now, conducted by a common carrier a general interstate railway business. That the right of way over said lots and tracts forms a connection between said main line of said railway system and the terminals of said railway system in the city of Seattle upon which said terminals is located a large and expensive passenger depot used by said common carrier as a general passenger station in the city of Seattle, and said right of way was, at the time of said assessment, and is now, devoted exclusively to use for right of way and trackage purposes only, for said main tracks, together with a number of side tracks maintained thereon.

"(5) That the whole surface of said lots and tracts before mentioned was, at the time of said assessment, and is now, graded to a level of from thirty-six (36) to twenty-two (22) feet below the grade of Fourth Avenue South and other abutting streets, and that all access by said Fourth Avenue South to and from said lots and tracts, and each thereof, is

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barred by a concrete retaining wall which said Seattle and Montana Railroad Company is required, by the terms of Ordinance Number 10545 of the City of Seattle, to construct along the west line of said Fourth Avenue South, which has already been partially completed a long distance along said west line, and which, when completed, will rise at least twenty-two (22) feet above the level of said lots and tracts. That said railway tracks on said lots and tracts enter a tunnel a little over a mile in length, running under the city of Seattle, at a point on the west side of Fourth Avenue South and the north terminus of the lots above described, at a grade of thirty-six (36) feet below the grade of Fourth Avenue South as said grade is permanently established by the improvements for which this assessment is made. That said tunnel is an expensive structure, adapted for permanent use for railway purposes only, and constitutes an essential part of said system, and the main connecting link between the terminals of said system in the southern part of the city of Seattle, and the eastern terminus of said system, and that through it run two main tracks of said system on the same grade as said tracks are laid and maintained on the lots and tracts before mentioned.

“(6) That all of said lots and tracts have been, for a long time prior to the assessment herein, and are now, exclusively devoted to railway use as right of way to carry and sustain railway tracks, and that by reason of their grade, of their location, and of their connection with the tunnel aforesaid, and the passenger station aforesaid, and of the great expense incurred by the Great Northern Railway system in so locating and adapting them to railway uses, they are permanently adapted to right of way and railway uses, and that character of use is the only use to which said lots and tracts are now adapted and the only use to which they will be permanently adapted while they continue in the condition now fixed by the improvements and expenditures heretofore found.

“(7) That the aforesaid lots and tracts are not, nor any of them, nor any part or portion of them, actually benefited by the improvement for which they are assessed herein, while and as long as they are devoted to the use hereinbefore found.

“(8) That said lots and portions of vacated streets, if and when devoted to any other uses than the uses hereinbefore found, are, and will be actually benefited to the amounts severally assessed to each thereof in said assessment roll.”

While these specific findings may not have been made in the case of the *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, the same facts and conditions were nevertheless present in that case and were fully considered by this court. The appellant contends, however, that the *Northern Pacific* case is not in point here, because the assessment district there involved was created by ordinance of the city of Seattle, and the court deemed the legislative declarations of benefits conclusive upon it. The court did no doubt consider the effect to be given to such legislative declaration, but the decision was not rested exclusively upon that ground, for in answer to the contention the appellant now makes, the court said:

"The appellant contends that the land held and used by it as a right of way cannot be assessed for local street improvements; that a special assessment can only be levied when a special benefit produced by the improvement inures to the property assessed; that, unless it can be affirmatively shown that some special benefit does result, no assessment can be imposed; that the strip of land used solely as right of way for railway trains is not benefited by the improvement of an abutting street; that the public use to which the land is exclusively devoted is not thereby rendered more valuable; that trains can pass and repass as well without as with the improvement; that appellant only occupies its land as a right of way, not owning the fee, and that its easement is not subject to special assessment. Although the appellant may not hold the fee-simple title, there is no reasonable or immediate probability that it will abandon the land. Its use will doubtless be perpetual. Appellant is therefore for all practical purposes the substantial owner. The fee, subject to its use and easement, is of but little value, if any. Except for appellant's occupancy, no suggestion would be made that the land was not benefited by the improvement, or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property cannot be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement. The benefit is presumed to inure, not to such present use, but to the property itself, affecting its value."

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Furthermore, if any presumption is to be indulged in favor of a legislative declaration of benefits, the like presumption will attach to any assessment district created by legislative authority. Here the assessment district was established by three commissioners appointed by the superior court, pursuant to legislative authority. These commissioners acted in an administrative or legislative capacity in forming the assessment district and the usual presumption attaches to their acts in that regard. We do not think, therefore, that the case can be distinguished on this ground.

The objection to the validity of the legislative act is two-fold; first, because it purports to delegate legislative power to the superior court; and second, because it purports to delegate legislative power to levy special assessments to others than the corporate authorities of the municipal subdivisions of the state. The constitutionality of the act of March 9, 1893, Laws of 1893, p. 189, was considered by this court in *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279, and the objections to the validity of the present act were there decided adversely to the appellant, excepting one to be presently noted. Section 22 of the act of 1905, p. 84, provides as follows:

"Sec. 22. It shall be the duty of the superior judge and such commissioners to examine the locality where the improvement is proposed to be made, and the lots, blocks, tracts and parcels of land that will be especially benefited thereby, and to estimate what proportion, if any, of the total cost of such improvements will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion; and having found said amounts, to apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement: *Provided*, That no lot, block, tract or parcel of land shall be assessed a greater amount than it will be actually benefited, nor shall any lot, block, tract or parcel of

land which shall have been found by the jury or court to be damaged be assessed for any benefits: *And provided further*, That it shall not be necessary for said commissioners to examine the locality excepting where the ordinance provides for the establishment, opening, widening or improvement of streets, avenues, alleys or highways. Such part of the compensation, damages and costs as is not finally assessed against property benefited shall be paid from any general funds of the city or town applicable thereto."

If this section should be construed literally, and the act should be held to require the judge of the superior court to go out with the commissioners to examine the property and assist in the formation of the assessment district and the preparation of the assessment roll, it would be difficult and perhaps impossible to sustain the act on constitutional grounds. But from a consideration of the entire act we are satisfied that *the superior judge* was included in this section through inadvertence, and that, when the act is construed in its entirety, the functions of the superior court are clearly limited to the appointment of the commissioners and a judicial review of the assessment roll returned by them. As thus construed, the act is fully sustained by the decision in the *Westlake* case.

From a consideration of the entire record, we are satisfied that the decision in this case is controlled by the decisions in the two cases cited, and for the reasons there stated the judgment is affirmed.

FULLEERTON and RUDKIN, JJ., took no part in the decision in *Northern Pac. R. Co. v. Seattle*, *supra*, and do not concur in the conclusions there announced.

[No. 7300. Decided July 28, 1908.]

THE CITY OF SEATTLE, *Respondent*, v. FRANK BUTY,
Appellant.¹

APPEAL—REVIEW—WAIVER—INCONSISTENT THEORIES. Where, in an action brought by a city to determine the damages to abutting property by a regrade, the defendant moved to dismiss the action for the reason that the city had failed to show any damage, the defendant cannot urge error in the direction of a verdict of no damages for the plaintiff because the jury viewed the premises and the question of damages should have been submitted to it.

Appeal from a judgment of the superior court for King county, Poindexter, J., entered December 7, 1906, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action to determine the damages to abutting property owners from the regrade of street. Affirmed.

William C. Keith (*F. R. Conway*, of counsel), for appellant.

Scott Calhoun and *O. B. Thorgrimson*, for respondent.

PER CURIAM.—This proceeding was instituted by the city of Seattle to ascertain and determine the damages resulting to abutting property owners from the regrade of Jackson street in that city. Two witnesses on the part of the city testified that the lot owned by the defendant Buty would be benefited by the regrade from \$50,000 to \$75,000. No further testimony was offered on the question of damages or benefits by either side, and the court directed the jury to return a verdict of no damages. From the judgment entered on this verdict, the present appeal is prosecuted.

In support of his appeal, the appellant earnestly insists that inasmuch as all the testimony in the case was expert or opinion evidence, and the jury viewed the premises, the court

¹Reported in 96 Pac. 962.

was in error in taking the question of damages from the jury. But in view of the position taken by the appellant in the court below, he cannot be heard to make his present contention before this court. At the close of the testimony, the appellant moved the court to dismiss the action for the reason that the city had failed to show any damage to his property. For the like reason respondent moved for a directed verdict of no damages. Both parties took the position before the lower court that there was no question of damages for the jury to pass upon; they only differed as to the form of the judgment that should be entered. For aught that appears, the question of damages would have been submitted to the jury had the appellant taken the same position in the lower court that he now takes in this court. We must therefore refuse to consider the question discussed in the briefs and argument, and the judgment of the court below will be affirmed.

[No. 7190. Decided July 28, 1908.]

A. A. WARWICK, *Respondent*, v. GEORGE H. HITCHINGS *et al.*,
Appellants.¹

VENDOR AND PURCHASER—CONTRACT—CONSIDERATION—EVIDENCE. In an action for the purchase price of land sold and conveyed, upon an issue as to whether the contract price was \$1,100 or \$100, evidence of its market value at the time of the sale is admissible, as bearing on the probabilities.

SAME. In an action for the purchase price of land sold and conveyed, upon an issue as to whether the price was \$1,100 or \$100, evidence is admissible that the citizens of the place had, at the time of the sale, subscribed \$1,000 to aid in the purchase of the property or in the construction of a sawmill thereon by the defendants, as supporting plaintiff's claim if the same was for the purchase of the land, or as a circumstance in favor of defendants if the subscription was in their aid.

¹Reported in 96 Pac. 960.

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APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. In an action for the price of land sold for a mill-site, the admission of evidence as to the kind of mill to be erected by defendants is harmless error, where the same question was gone into on cross-examination of one of the defendants without objection.

EVIDENCE—HEARSAY. Evidence of a statement of one not a party, who had aided in securing a subscription, as to the purposes of the subscription, is inadmissible as hearsay, when not offered for the purpose of impeachment.

VENDOR AND PURCHASER—ACTION FOR PRICE—PLEADING—MATTERS TO BE PROVED—PARTNERSHIP. In an action against two defendants for the purchase price of land sold and conveyed, the allegation that they were copartners is immaterial, as their liability as joint purchasers would be the same as that of partners.

EVIDENCE—CONTRACT—PAROL EVIDENCE—CONSIDERATION FOR DEED. Where, in an action for the purchase price of land sold and conveyed, it appeared that the plaintiffs had executed an option on April 11, agreeing to convey the property for \$1,100, and on April 20 they agreed to convey the property for \$100, the deed not to be delivered until a mill had been erected on the property and was in running order, parol evidence is admissible to show that a deed executed and delivered on April 26th, and reciting a consideration of \$100, was delivered under either of such contracts, or to show the actual consideration agreed to be paid.

SAME—DEFENSES—ESTOPPEL. In an action to recover the purchase price of lands sold and conveyed, the fact that plaintiff had retained certain bonus notes and sums collected for the benefit of the defendants, does not amount to an estoppel to prosecute the action, but at most a counterclaim or independent demand.

APPEAL—REVIEW—VERDICT. A verdict upon conflicting evidence will not be set aside on appeal, although contrary to the conviction of the supreme court.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered July 12, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover the purchase price of real property. Affirmed.

Wilson R. Gay and *C. W. Hodgdon*, for appellants.

W. H. Abel and *E. A. Philbrick*, for respondent.

RUDKIN, J.—This was an action to recover the balance due on the purchase price of certain real property, conveyed by the plaintiff and his wife to the defendants. The complaint

alleged that the agreed purchase price was \$1,100, that \$100 had been paid thereon, and that the defendants failed and refused to pay the balance due. The answer denied that the purchase price was \$1,100, or any other or greater sum than \$100, and averred that the purchase price had been fully paid. The case was tried before a jury, and from the judgment entered on a verdict in favor of the plaintiff, this appeal is prosecuted.

Under the issues presented by the pleadings, the respondent offered proof tending to show the market value of the property conveyed, at the date of the conveyance, and the ruling of the court in admitting this class of evidence is assigned as error. In *McCowan v. Northeastern Siberian Co.*, 41 Wash. 675, 84 Pac. 614, the court said:

"It is held by this court, in common with many other courts, that, in controversies where a special agreement is alleged on one side and denied on the other, it is relevant to put in evidence any circumstance which tends to make the question at issue more or less probable; this, not to change the contract, but as evidence of what it was."

See, also, *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101, and cases cited. Under these decisions there was no error in the rulings complained of.

It appeared in the course of the trial that a subscription list had been circulated in the town of Moclips, at or before the time the property was conveyed to the appellants, and that the citizens of that place had subscribed the sum of \$1,000 to aid in the purchase of this property, or in the construction of a sawmill thereon by the appellants. The admission of evidence relating to this subscription list is assigned as error. The evidence was offered in the first instance for the purpose of showing the relationship existing between the three appellants, but the court afterwards ruled that that question was not material. If it appeared that the money thus subscribed was to be paid to the respondent on account of the purchase price of this land, such proof would be de-

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cisive against his present claim. If, on the other hand, the subscription was in aid of the appellants, we think it was a circumstance proper for the consideration of the jury, on the same principle that evidence relating to the value of the property was competent.

The admission of evidence tending to show the kind of a mill the appellants agreed to construct on the property is next assigned as error. The relevancy of such testimony is not apparent, but the same question was gone into fully on the cross-examination of one of the appellants, without objection, and we fail to see wherein the testimony could be at all prejudicial. The appellants offered to prove by one of their witnesses that one Hays had made a statement that the money raised by the subscription was to go to the respondent. This testimony was not offered for the purpose of impeachment and was clearly hearsay, as it is not contended that the party who made the statement or admission had any connection with either of the parties to this action, beyond the fact that he circulated or assisted in the circulation of the subscription list. The complaint alleged that the appellants were copartners, but the court ruled at the trial that this allegation was not material and need not be proved as alleged. This ruling was correct. Where an allegation of partnership is material it must be proved as alleged, but in this case it would seem utterly immaterial whether the appellants were partners or joint purchasers, as their liability to the respondent would be the same in either case.

The admission of testimony tending to vary the terms of a certain written contract dated April 20, 1906, and to vary the terms of the deed conveying the property to the appellants is next assigned as error. It appears from the testimony that the respondent and his wife executed an option under date of April 11, 1906, agreeing to convey the property to the appellant Linder in consideration of the sum of \$1,100. Under date of April 20, 1906, the respondent and his wife and the appellant Linder entered into a further agreement where-

by the respondent and his wife agreed to convey the property to the appellant Linder in consideration of the sum of \$100, the deed to be delivered when the mill to be constructed on the property was in running order and cutting lumber. The deed, reciting a consideration of \$100, was executed on the 26th day of April, 1906, and was delivered at that time or soon thereafter. We do not understand why either the respondent or the appellants should be precluded from showing that the deed was not executed or delivered under either of these agreements. Under the agreement of April 20, 1906, the deed was not to be delivered until the mill was in running order and cutting lumber, but it was manifestly delivered before that time under some other agreement. It was therefore competent for the parties to show the actual agreement under which the deed was delivered and the actual consideration agreed to be paid, regardless of the prior option or agreement. The authorities are practically agreed that in actions of this kind the parties may show the true consideration for a sale, regardless of the consideration recited in the deed of conveyance. *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435; *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964; *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892; *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020.

It appeared from the testimony that certain bonus notes, executed in favor of the appellants, were retained by the respondent in his possession, and that he collected certain small sums due thereon, without accounting to the appellants therefor. It is contended that this conduct on the part of the respondent should operate as an estoppel against his present claim. If, as a matter of fact, the appellants agreed to pay the respondent \$1,100 for the property, and have not paid the same, we do not understand on what principle the respondent should be estopped, simply because he retained in his possession certain notes executed in favor of the appellants and collected certain small sums due thereon. Such facts might give

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rise to a counterclaim or an independent cause of action in favor of the appellants, but could not work an estoppel.

Error of the court is lastly assigned in the denial of a motion for nonsuit, the denial of a motion for judgment at the close of all the testimony, the denial of a motion for judgment notwithstanding the verdict of the jury, and the denial of a motion for a new trial. All these assignments are based on the insufficiency of the evidence to justify the verdict, and upon certain exceptions to the charge of the court. The writer of this opinion would doubtless have reached a different conclusion had the testimony in this case been submitted to him, but this court does not sit here to review the verdicts of juries based on conflicting testimony, and such was the testimony in this case. The instructions of the court were eminently fair to the appellants, and finding no error in the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, and MOUNT, JJ., concur.

[No. 7405. Decided July 28, 1908.]

EDWIN A. STEVENS *et al.*, Appellants, v. JOHN DOOHEN *et al.*,
Respondents.¹

JUDGMENT—RECITALS—SERVICE OF PROCESS—PRESUMPTION. A tax foreclosure judgment will not be set aside for failure of the summons by publication, prior to amendment thereof, to properly describe the property, where the court found and the judgment recited due service of the summons, and there was no proof that another due service had not been made on the defendant, who was a resident in an adjoining county; and the fact that a clerical error in the judgment in one place referred to the lot by the erroneous description used in the summons as first published does not affect the presumption of due service, the error in the judgment being surplusage.

TAXATION—JUDGMENT—IRREGULARITY—EFFECT. An irregularity in a tax foreclosure judgment foreclosing a lien against lot 23, in giving the number of the lot in a tabulated statement as lot 22, following the proper description, is a clerical error to be treated as surplusage that does not avoid the judgment.

¹Reported in 96 Pac. 1032.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 20, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to set aside a tax deed and to quiet title. Affirmed.

McCormick & Lyle and Charles A. Murray, for appellants.

Boyle, Warburton, Quick & Brockway, and Walter M. Harvey, for respondents.

MOUNT, J.—This action was brought by the appellants to set aside a tax deed, to quiet title, and to obtain possession of lot 23, in block 1707, in the city of Tacoma. It appears that the appellants, A. E. Stevens and wife, acquired this lot in the year 1888. They paid no taxes on the lot after the year 1895. The taxes became delinquent for the year 1896 and subsequent years. On May 13, 1901, respondent John Doochen purchased a certificate of tax delinquency against the lot. Thereafter in July of 1901, he brought an action to foreclose this certificate for taxes and interest, amounting to \$410.82. A summons describing lot 22, in the same block, was served upon the county treasurer, and a copy was published four successive weeks in the "Tacoma New Herald." This summons was then changed so as to describe lot 23, and was published three successive weeks in the same paper. The last publication was made on September 7, 1901. On that date the publisher of the paper made an affidavit that the summons describing lot 23 was published seven successive weeks from July 20 to September 7, 1901. On July 18, 1901, an application was made for judgment. In this application the lot was described as lot 22, block 1707. On September 23, 1901, an order of default was entered, and on the same day a judgment was entered which recites the following:

"This cause having this 23d day of September, A. D. 1901, been brought on to be heard upon the application for judgment foreclosing the tax lien filed herein, the plaintiff being

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represented by his attorney F. Campbell, and the defendant being in default and his default entered, and upon proofs adduced, it appearing to the court that the statements and allegations set forth in said application are true, the court finds as follows: First. That there is now outstanding an unredeemed certificate of delinquency numbered 383, issued on the 13th day of May, A. D. 1901, by the county of Pierce, state of Washington, for the amount of \$56.25, the same being the amount then due and delinquent for taxes for the year 1896, together with penalty, interest and costs thereon, upon real property situate in said county, and particularly bounded and described as follows, to wit: Lot 23, block 1707, map of Tacoma, according to the recorded plat on file in the auditor's office of Pierce county, Washington. . . . Seventh. That summons and notice has been duly served in this proceeding as required by the statute of this state, and such statute complied with in all other respects pertaining thereto. It is therefore adjudged and decreed that plaintiff herein be given judgment against the property hereinbefore mentioned, for the aforesaid amount of plaintiff's lien, with costs amounting to \$410.82, which said judgment shall be a several judgment against each tract or lot, or part of a tract or lot of land hereinbefore mentioned, in the amount set opposite thereto, as follows."

Then follows a tabulated statement of the taxes, interest, and costs itemized for the different years, and a description of the property as "lot 22, block 1707, map of Tacoma." The decree concludes with an order upon the treasurer to sell "the premises hereinbefore mentioned." The county treasurer, pursuant to this order, sold lot 23, block 1707, in October, 1901, and John Doohen became the purchaser for the amount of the judgment. It is stipulated that the lot at that time was worth \$450. Mr. Doohen took possession of the lot and made certain improvements thereon, and paid street assessments to the amount of \$1,200. On January 10, 1906, he sold the lot and an adjoining lot to respondent Williams and wife for \$12,000. A short time prior to the bringing of this action, the appellants Stevens and wife conveyed an undivided one-half interest to appellants Rea and

wife. Owing to the advance in price of real estate, the lot is now worth about \$10,000. Before bringing the action, appellants tendered to respondents \$1,800 in payment of taxes, street assessments, improvements, interest, and costs. Upon the trial of the case the court found that the plaintiffs were guilty of laches, and therefore dismissed the action. Plaintiffs appeal.

There are facts in the record which tend strongly to show laches on the part of the appellants, but we shall not consider these facts because we prefer to rest the decision of the case upon the validity of the judgment in the tax foreclosure proceeding. At the trial the appellants offered in evidence the entire record in the foreclosure proceeding. This record shows certain imperfections, particularly in the number of the lot, but the judgment upon its face shows jurisdiction in the court and appears to be regular. It shows that the court received proof and found that summons had been regularly served as required by the statute. There is no proof in the record that no other summons than the one in the record was served. The evidence shows that the defendant in that action was a resident of Olympia at that time, and there is no evidence that he and the county treasurer were not served personally with a proper summons.

In *Bock v. Sanders*, 46 Wash. 462, 90 Pac. 597, we said:

"It is the established law in this state that when the judgment recites that due service of process was made, the presumption of jurisdiction is not overcome by any defects in the record. *Noland v. Arnot*, 36 Wash. 101, 78 Pac. 463, and cases cited."

In *Peterson v. Lara*, 46 Wash. 448, 90 Pac. 596, we said:

"This question has been decided so often that it is no longer an open one in this court."

The appellants seek to distinguish these cases by the assertion that the judgment in this case is not regular upon its face by reason of the fact that, in the tabulated itemized

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statement, the lot is referred to as lot 22. This is clearly a clerical error, for the judgment is rendered against lot 23. Just preceding the tabulated statement the judgment is given "against the property hereinbefore mentioned," and the only property before mentioned was lot 23, which was particularly described. The form of judgment used was a printed form adapted to the foreclosure of liens for more than one parcel or lot of land at the same time, and in such cases there would be necessity for the amount to be segregated to each parcel. But in this case there was no necessity for such segregation or further designation of the number of the lot. This subsequent statement of the number of the lot was therefore surplusage, and was not even misleading because it is manifestly a clerical error. It certainly did not amount to an irregularity sufficient to defeat the judgment. Appellants also cite the case of *Bauer v. Widholm*, 49 Wash. 310, 95 Pac. 277, but that was a case where we held that the summons was void and where it was admitted by the pleadings that "no service whatever had been made other than the one above mentioned."

We are of the opinion that the judgment in the tax foreclosure case was a valid judgment under the facts shown, and the judgment appealed from must therefore be affirmed.

HADLEY, C. J., CROW, and FULLERTON, JJ., concur.

[No. 7196. Decided July 29, 1908.]

E. P. BEHLING *et al.*, Respondents, v. SEATTLE ELECTRIC
COMPANY, Appellant.¹

CARRIERS—INJURY TO PASSENGERS—SUDDEN JERKS—ACTIONS—INSTRUCTIONS. In an action against a street car company for injuries sustained by a passenger by reason of a sudden unusual jerk in starting, it is proper to refuse to instruct that some lurching or jerking was well known to be necessary for the operation of electric cars, and that plaintiff could not recover unless the court believed that there was lurching or jerking out of the ordinary, or such as would indicate negligent operation, where it was not claimed that the car could be operated without some jerking, and other instructions sufficiently recognized that the only issue for the jury relating to the movement of the car was whether the same was unusual.

SAME—DEGREE OF CARE—INSTRUCTIONS. An instruction to the effect that a street car company is bound to exercise the highest degree of care reasonably practicable to see that an entering passenger has ample opportunity to be in a place of safety before starting the car, is not objectionable as declaring the rule that it is negligence *per se* to start a car before a passenger has secured a seat, where it is immediately followed by instructions making it clear that the questions before the jury were whether the plaintiff used reasonable care for her own safety and whether the company in starting the car exercised the highest degree of care reasonably practicable under the conditions existing.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 29, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger through the negligent starting of a street car. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Daniel Landon and *Jesse A. Frye*, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries received by the plaintiff Cecelia A. Behling while riding upon one of defendant's street cars. The com-

¹Reported in 96 Pac. 954.

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plaint alleges that the plaintiffs, who are husband and wife, together with their children, boarded the car after it had stopped at a street crossing; that the conductor assisted one of the children to the car, and after all had reached the rear platform, and just as the plaintiff Cecelia A. Behling was about to enter the rear door, and before she had time or opportunity to enter the car and secure a seat, without warning to her, the car started and then suddenly stopped, causing an unusual, quick and sudden jerk, whereby she was thrown with great force against the handles of the rear door, and then violently thrown down upon the door-sill and the floor of the car. A trial was had before a jury, and a verdict for the plaintiffs was returned in the sum of \$3,000. From a judgment for that sum, the defendant has appealed.

It is assigned that the court erred in refusing to give the following instruction:

"I instruct you that it is a well known fact that cars operated by cable or electricity cannot be operated without some lurching or jerking, and unless you believe from the evidence that there was some lurching or jerking out of the ordinary, or such that would indicate negligent operation, then the defendant company is not responsible."

It was not error to refuse the instruction. It was not claimed by the respondent that the car could have been operated without some lurching or jerking, and no such an issue was tendered by the pleadings or introduced by evidence before the jury. The averment in the complaint and the claim at the trial was that the jerk was a quick, sudden, and unusual one. The instructions that were given sufficiently recognized that such was the only issue relating to the motion of the car which was before the court and jury, and the jury could not have been misled as to the issue in this particular.

It is further contended that it was error to give the following instruction:

"You are further instructed that if you believe from the evidence in this case that Cecelia A. Behling, one of the

plaintiffs, in her efforts to get upon the platform of, and to enter, the defendant's car, at the time and place and manner alleged in plaintiffs' complaint, acted as an ordinarily prudent woman generally acts under circumstances similar to all those which then surrounded her; and if you believe from a preponderance of the evidence, that the said Cecelia A. Behling did get upon the rear platform of the defendant's car while the same was there standing still, and immediately after other passengers had alighted from said car, and that the defendant's servants and employees started said car without having exercised the highest degree of care and prudence reasonably practicable under the circumstances and conditions existing at the time and place in question, to see that the said Cecelia A. Behling was in a place of safety and had had ample opportunity, she exercising ordinary care, to secure a seat in said car, and that the negligent starting of the said car threw the said Cecelia A. Behling against the handles of the rear door of said car and then down and upon and against the rear door-sill of said car, and then upon the floor of said car, as alleged in the complaint, and that she was injured as is alleged in the complaint; then and in that event, your verdict will be for the plaintiffs."

Appellant argues that the above declares the rule of law to be that it is negligence *per se* to start a car before a passenger has had ample opportunity to secure a seat. We think such a conclusion from the language used may hardly be fairly drawn, considering all that was said. The seeming intent of the language used was to declare that it was the appellant's duty to exercise the highest degree of care and prudence reasonably practicable under the circumstances existing at the time and place, to see that the respondent had ample opportunity to be in a place of safety. If, however, there was any doubt upon this subject, it seems to us it was fully removed by the paragraph of the instructions immediately following what is quoted above. The paragraphs of the instructions were not separated by even so much as numbers, and what is quoted below followed the other in immediate succession so that the two paragraphs, treating as they do upon the same phase of the case, may well be re-

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garded as one entire instruction. The remainder of the instruction upon that subject was as follows:

"You are further instructed that, if you find from a preponderance of the evidence that the said Cecelia A. Behling got upon the rear platform of said car, and thereafter while endeavoring to secure a place of safety and a seat in said car, she exercised reasonable and ordinary care for her own safety under all the circumstances, and proceeded as expeditiously as she could under all the circumstances toward a seat in said car, and if before she became seated the defendant's servants and employees started said car without exercising the highest degree of care reasonably practicable under the circumstances and conditions existing at the time and place in question, and by reason thereof the said Cecelia A. Behling was injured, as is alleged in the complaint, such acts of the defendant's servants and employees would constitute negligence, and the defendant would be liable to the plaintiffs for damages sustained by the said Cecelia A. Behling, as a result of being thrown against the handles of the doors of said car and against the sill thereof and then thrown upon the floor of said car, provided you further find that she was without negligence on her part."

The above made it clear to the jury that the questions before them were whether the respondent exercised reasonable and ordinary care for her own safety, under all the circumstances, and whether, in starting the car, the appellant exercised the highest degree of care reasonably practicable under the conditions existing at the time and place.

We find no error in these instructions and, there being no other assignments, the judgment is affirmed.

FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7389. Decided July 29, 1908.]

DONALD JOHNSON, *Appellant*, v. MOTOR SHINGLE COMPANY,
Respondent.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—SAFE PLACE—STARTING MACHINERY WITHOUT WARNING. An inexperienced employee directed by an acting foreman to lift up a bull chain used to drag logs from the pond, for the purpose of making repairs, does not assume the risks from the starting of the chain by the drag sawyer, as he had a right to assume that proper notice would be given the sawyer and the place kept safe by withholding further movement until the repairs were made.

SAME—VICE PRINCIPALS. A saw filer in a mill, who assumed the duties of foreman on a day when the latter was absent, must be held to be a vice principal until the contrary is shown.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 27, 1908, upon granting a nonsuit at the close of plaintiff's testimony, in an action for personal injuries sustained by an employee in a sawmill. Reversed.

Fred H. Peterson and *H. C. Force*, for appellant.

R. S. Eskridge (*L. Arnold*, of counsel), for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries. At the close of the plaintiff's testimony a nonsuit was granted. The plaintiff appeals.

The facts appearing in evidence are substantially as follows: The appellant went to work in respondent's mill in July, 1907. On the day he began, the regular foreman was away. He was directed by a man named Henderson to fasten logs to the bull chain, so that they might be hauled from the water up the chute into the mill. Appellant is a young Swede who had been in this country but eight months at the time of his said employment. His knowledge of the English

¹Reported in 96 Pac. 962.

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language was imperfect. He had previously worked in a mill yard, but had never performed the class of work at which Henderson put him. The work required the driving of so-called "dogs," being heavy hooks or clasps, into the logs in the boom at the foot of the chute. Chains called "dog chains" were fastened to these dogs, and after attaching the dogs to the logs, it was appellant's duty to attach the chains to the bull chain so that the logs might be drawn up to the drag saw where they were cut into suitable lengths. The movement of the bull chain was controlled by the drag sawyer, who could not see the appellant down at the water's edge. Ordinarily the bull chain was kept going continuously through the day, except when stopped by the drag sawyer to cut the logs into the required lengths. This occasioned frequent starting and stopping of the chain. The movement of the chain was slow, and with ordinary care, the dogs could be safely fastened into the logs and the chains into the bull chain while the latter was in motion. In the afternoon of the first day that appellant worked at this place, one of the iron plates which protected the groove in which the bull chain ran came loose, and Henderson directed the appellant to lift up the chain over the plate, so that the latter might be re-adjusted. The direction was given at a time when the chain was not in motion and appellant, having lifted the chain, was holding it, when it began to move, and caught his hand, crushing his finger. The drag sawyer, not having been notified of appellant's situation and not being able to see him, started the chain, and immediately after appellant's hand was caught, Henderson notified the drag sawyer, who thereupon stopped the chain.

Upon the foregoing facts, the trial court held that appellant assumed the risk of the danger, for the reason that he must have known as well as the master that the chain was liable to move at any time. We think it does not appear, as a matter of law, that such was true. Appellant had never had any experience in this class of work before that day.

He followed the directions of the only person who had assumed to direct his movements on that day. If he was following the directions of a representative of the master, he had a right to assume that the place was made safe for him by a proper notification to the drag sawyer to withhold movement until the repair was made. Did he follow the directions of the master's representative? So far as the evidence before the jury was concerned, we think that he did, and that Henderson at the time sustained toward him the relations of a vice principal. Henderson's regular work was that of saw filer, but in the absence of the foreman on that day, Henderson assumed to discharge the duties of foreman. The master could not start the mill to going and go off and leave it without some responsible representative in charge. Until it is otherwise shown, therefore, the one apparently discharging the functions of such a representative at the time must be held to have been such. We think there were sufficient facts for the jury, and that it was error to grant the nonsuit.

The judgment is reversed, and the cause remanded with instructions to grant a new trial.

FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7457. Decided July 29, 1908.]

MILES P. BENTON *et al.*, *Appellants*, v. SEATTLE ELECTRIC COMPANY, *Respondent*.¹

MUNICIPAL CORPORATIONS—CITY COUNCIL. The "legislative authority" of a city, as used in the constitution and statutes of this state, means the mayor and city council.

SAME—CHARTER—AMENDMENTS — LIMITATION BY GENERAL LAWS. The power to amend a city charter, under the direct amendment act, Laws 1903, p. 393, authorizing the submission of amendments to a vote of the people, is limited to the extent that amendments cannot be adopted that override a general statute of the legislature which deals directly and specifically with the subject in question.

¹Reported in 96 Pac. 1033.

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Opinion Per Root, J.

STREET RAILROADS—FRANCHISE — VALIDITY — MUNICIPAL CORPORATIONS—CITY COUNCIL—POWERS. Laws 1903, p. 364, vests in the legislative authority of the city, i. e., its mayor and council, the power of granting street railway franchises, and a franchise is valid without submission of the same to a vote of the people.

SAME—AMENDMENTS TO CHARTER. The amendment to the Seattle city charter, art. 4, § 20, which required an ordinance granting a street railway franchise to be submitted to a vote of the people, is void, since the legislature by Laws 1903, p. 364, vested in the legislative authority of the city the power of granting street railway franchises; hence an ordinance granting a franchise without the restrictions imposed by such amendment is valid.

Appeal from a judgment of the superior court for King county, Morris, J., entered June 16, 1908, upon sustaining a demurrer to the complaint, dismissing an action to annul a street railway franchise. Affirmed.

Wardall & Wardall, for appellants.

James B. Howe, for respondent.

Root, J.—On the 29th of April, 1908, the Seattle Electric Company, a corporation operating a street car system in the city of Seattle, made application to the council of that city for a franchise to construct, maintain, and operate a street railway upon certain parts of Alki avenue, 63d avenue southwest, and other streets, avenues, and places in that city. On the 1st of June, 1908, the city council passed an ordinance granting such franchise, and the same was approved by the mayor on June 5, 1908. This ordinance complied in all respects with the charter of the city of Seattle as the same existed prior to and up to the time of the adoption of the amendments to such charter made at the municipal election in March, 1908. On account of it not complying with these amendments, this action was prosecuted by the plaintiffs, who are residents, property holders, and taxpayers within said city, to enjoin the city officers from authorizing the construction of said railway under said franchise, or recognizing any franchise as being granted, and for a decree declaring such attempted franchise to be null and void. A demurrer to the

complaint was sustained, and the plaintiffs electing to stand upon their demurrer, a judgment of dismissal was entered, from which this appeal is prosecuted.

Section 20 of art. 4 of the city charter, as amended at the election in March 1908, contains the following:

"Every grant of a franchise, right or privilege shall be subject to the right of the city council, or the people of the city acting for themselves by the initiative and referendum, at any time subsequent to the grant, to repeal, amend or modify the said grant with due regard to the rights of the grantee and the interest of the public; and to cancel, forfeit and abrogate any such grant if the franchise granted thereby is not operated in full accordance with its provisions, or at all; and at any time during the grant to acquire, by purchase or condemnation, for the use of the city itself, all the property of the grantee within the limits of the public streets, at a fair and just value, which shall not include any valuation of the franchise itself, which shall thereupon terminate; and every ordinance making any such grant shall contain a reservation of these rights of the city council, and of the people of the city acting for themselves by the initiative and referendum, to so repeal, amend or modify said ordinance, and to so cancel, forfeit and abrogate the grant, and to so acquire the property of the grantee in the public streets, as hereinabove set forth. The city council shall not consider or grant any application for extension of the period of any franchise, nor any new franchise covering all or any substantial part of the rights or privileges of any existing franchise, until within three years of the expiration of the existing grant, and then only after submission to and approval by majority vote of the qualified electors. . . . The proposed franchise shall further contain all other reservations and limitations set forth in this charter and the laws of the state. . . . If the proposed franchise ordinance receives in its favor a majority of all the votes cast for and against the same, it shall be deemed to be ratified and the city council may thereupon finally pass and adopt the same. If it fail to receive said majority in its favor, the franchise ordinance shall be deemed rejected and no further proceedings shall be had thereunder. The same methods of procedure shall obtain in the extension of any existing fran-

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chises, or any rights thereunder, as in the grant of a new franchise. No street railway franchise shall in any event be granted, extended or renewed to any date beyond December 31st, 1934." Seattle Charter (Revised Ed. 1908), art. 4, § 20.

Section 1 of art. 4 of the charter of the city of Seattle, as amended at the election in March, 1908, contains the following:

"The legislative powers of the city of Seattle shall be vested in a mayor and city council, who shall have such powers as are provided for by this charter; but the power to propose for themselves any ordinance dealing with any matter within the realm of local affairs or municipal business, and to enact or reject the same at the polls, independent of the mayor and city council, is also reserved by the people of the city of Seattle and provision made for the exercise of such reserved power; and there is further reserved by and provision made for the exercise by the people of Seattle of the power, at their own option, to require submission to the vote of the qualified electors, and thereby to approve or reject at the polls any ordinance, or any section, item or part of any ordinance dealing with any matter within the realm of local affairs or municipal business, which may have passed the city council and mayor, acting in the usual prescribed manner as the ordinary legislative authority."

The amendments to the charter voted on in March, 1908, were made pursuant to "An act providing for the direct amendment of city charters with respect to local affairs," approved March 21, 1903, commonly known as the "direct amendment act." Laws 1903, p. 393. It is conceded by respondent that, if the amendment adopted by the people at the election in March, 1908, constitutes a valid portion of the charter of the city, then the franchise is invalid, and the demurrer should have been overruled; and it is conceded by appellants that, if said charter amendment is invalid, then the ordinance is legal and the demurrer was properly sustained. Respondent makes the following contentions:

"The legislature of the state having enacted a general law granting to the legislative authority of cities the authority

to authorize the construction, maintenance and operation of street railways and electric railways upon the streets of cities and to prescribe the terms and conditions of such construction and operation, the attempted amendment of the charter of the city, so as to impair, surrender and abrogate such authority is illegal.

"The attempted amendment of the charter, being in conflict with a general law of the state upon the particular subject of electric railways, is invalid.

"The abrogation of the power of the city to grant franchises which would have any effect after December 31, 1934, being a void attempt to surrender a power conferred by the legislature, and such abrogation being the inducement for the adoption of the amendment, the whole amendment is void.

"The attempted amendment, having been adopted pursuant to the provisions of the direct amendment act of 1903, and the method prescribed in that act being in conflict with the constitution of the state, the attempted amendment is void.

"The franchise amendment being complete within itself, and having its own provision in regard to a referendum, and being void, the separate amendment providing for the initiative and referendum has no application to franchises."

The legislature of 1903 passed a law relating to electric railroads, street and other electric railways (Laws 1903, page 364), wherein it provided as follows:

"Sec. 1. The legislative authority of the city or town having control of any public street or road, or, where such street or road is not within the limits of any incorporated city or town, then the board of county commissioners of the county wherein such road or street is situated, may grant authority for the construction, maintenance and operation of electric railroads or railways, together with such poles, wires and other appurtenances, upon, over, along and across any such public street or road, and in granting such authority the legislative authority of such city or town, or the board of county commissioners, as the case may be, may prescribe the terms and conditions on which such electric railroad or railway, and its appurtenances shall be constructed, maintained and operated upon, over, along and across such road or street, and the grade or elevation at which the same shall be con-

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structed, maintained and operated. . . All acts and parts of acts in conflict with this act are hereby repealed."

In 1907 this statute was amended in certain particulars. Laws 1907, p. 192. It is the contention of the respondent that the statute under which the charter amendments were made does not authorize any amendment which would conflict with the statute of 1903, and the same as amended in 1907, relating to "electric railroads, street and other electric railways." These latter statutes vest in the "legislative authority" of the city power to prescribe the terms and conditions upon which electric railroads and railways may be constructed, operated, and maintained. It is maintained that the expression "legislative authority of the city" means the mayor and city council. This contention is doubtless correct. That expression as used in § 10, art. 11, of the state constitution and in numerous statutes of the legislature, undoubtedly means the mayor and council of the city. Bal. Code, § 740 (P. C. § 3733).

The question is then squarely presented as to whether the statute of 1903, and as amended by the statute of 1907, limits the powers granted by the statute of 1903 known as the "direct amendment statute." It is urged by respondent that the last-mentioned statute is thus affected and that, under the well-established rule that a general must give way to a special statute and a former to a latter, it follows that the direct amendment statute must give way, in so far as its provisions are contravened or limited by those of the statutes referring directly to street railways, one of which was enacted subsequent to the direct amendment statute. We think this contention must be upheld. While the direct amendment statute vests power in the city to amend its charter, yet this cannot be construed to mean that the charter can be so amended as to override a statute of the legislature which was intended to and does deal directly and specifically with the subject-matter in question. In the case of *Tacoma Gas*

& *Elec. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655, this court said:

"It is a well-settled rule of construction that a delegation of powers will not be presumed in favor of a municipal corporation, unless they be such as are necessary to its corporate existence, but that the same must be clearly conferred by express statutory enactment. . . . It is sufficient to say, however, that the legislature having passed a general law upon the particular subject, the power to fix such rates must be found therein, if at all."

In the case of *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609, this language was used:

"It is the evident policy of the state constitution that the charters of cities of the first class and amendments thereto shall be subject to the control of general laws. Const. art. 11, § 10. The power is vested in the people to adopt their own charter, and also to amend it; but the matter is subject to the control of general laws."

See, also, *Tacoma Land Co. v. Pierce County*, 1 Wash. 482, 25 Pac. 904; *Meade v. French*, 4 Wash. 11, 29 Pac. 833; *Seattle & Montana R. Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835; *Olympia Water Works v. Thurston County*, 14 Wash. 268, 44 Pac. 267; *Pierce County ex rel. Maloney v. Spike*, 19 Wash. 652, 54 Pac. 44; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91.

It is insisted by respondent that the mayor and city council, as the legislative authority of the city, having been vested by the legislature with power to control the construction, operation, and maintenance of street railways, cannot delegate nor surrender that power to the voters or others. In the case of *State ex rel. Spokane & B. C. Tel. Co. v. Spokane*, 24 Wash. 53, 63 Pac. 1116, this court said:

"The volition to consent or refuse is one of the powers vested by the legislature in cities of the first class, and this continuing power cannot be diverted without the sanction of the legislature."

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McQuillan, Municipal Ordinances, p. 128, states the law thus:

"The principle is fundamental and of universal application, that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others."

See, also, *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Mayor etc. of Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702; *Attorney General v. Lowell*, 67 N. H. 198, 38 Atl. 270; *Vandalia R. Co. v. State*, 166 Ind. 219, 76 N. E. 980, 117 Am. St. 370; 20 Am. & Eng. Ency. Law (2d ed.), 1142; 4 Supp. to Ency. of Law, p. 95; 1 Dillon, Mun. Corp., 421; *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141.

This case is clearly distinguishable from that of *Hindman v. Boyd*, *supra*, wherein a charter amendment, adopted by the voters of the city, involved a gas franchise, there being no special statute of the legislature vesting the power over such matters directly and specifically in the "legislative authority" of the city as is the fact in the case at bar. We think that, under the statutes of the state, the city council was without authority to submit to the voters for their ratification any ordinance granting a franchise for a street railway company, inasmuch as the power of granting franchises of this kind is vested directly and specifically by the legislature in the legislative authority of the city; that is, in the mayor and city council. For these reasons the ordinance granting the franchise involved in this action was legal and valid, and it was not necessary nor proper that it should have been submitted to the voters. Neither was it necessary to embody the restrictions and limitations provided for in said charter amendments adopted at the municipal election in March, 1908.

Finding no error in the judgment of the superior court, the same is affirmed.

HADLEY, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7327. Decided August 1, 1908.]

THE STATE OF WASHINGTON, *on the Relation of J. G.
Wolfe, Respondent, v. JOHN PARMENTER, as
County Assessor, Appellant.*¹

STATUTES—TITLES AND SUBJECTS—TAXATION. The title of an act "relating to revenue and taxation" is sufficiently broad to include provisions exempting certain property from taxation.

SAME—AMENDMENTS—ERRONEOUS REFERENCE—EFFECT. Where the title of an act is declared to be one amending a specified former law "relating to revenue and taxation," while the law referred to relates to mining claims, the reference to the law is to be taken as a clerical error and surplusage; and the act being a clear treatment of the subject of revenue and taxation, is valid without reference to the law amended, as an independent act amending existing statutes by implication.

TAXATION—PROPERTY SUBJECT—CREDITS—MONEYS. Mortgages, accounts, certificates of deposit, judgments, state, county and municipal bonds and warrants, may all be classed as "credits" in the listing of property for taxation, but "moneys" cannot be so classed.

SAME—EXEMPTION OF CREDITS—EQUALITY. "Credits" are not property within Const. art. 7, §§ 1 and 2, requiring all property to be taxed in proportion to its value by uniform laws, "provided that a deduction of debts from credits may be authorized," and Laws 1907, p. 69, § 1, exempting the same is valid; since the total actual value of all property in the state may be taxed once without the taxation of credits and the taxation of credits would constitute double taxation, and any method which reasonably comprehends the taxation of all property once and avoids double taxation is within the requirements of the constitution (FULLERTON, J., dissenting).

SAME. The proviso to Const. art. 7, § 2, that debts may be deducted from credits in the assessment of property for taxation does not recognize credits as property within the requirement of the section that all property be taxed; inasmuch as the main subject of the action is the requirement of uniform taxation, and credits cannot be assessed without double taxation (FULLERTON, J., dissenting).

SAME—EXEMPTION OF MONEYS. Laws 1907, p. 69, § 1, exempting "moneys" from taxation, violates the constitutional requirement that all property be taxed.

¹Reported in 96 Pac. 1047.

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Citations of Counsel.

STATUTES—PARTIAL INVALIDITY—EFFECT. The unconstitutionality of Laws 1907, p. 69, § 1, in so far as it exempts moneys from taxation does not affect the constitutionality of its other provisions exempting credits.

MANDAMUS—PLEADING—GENERAL DEMURRER—APPEAL—DECISIONS—COSTS. A general demurrer to a petition in mandamus to compel the listing of moneys and credits for taxation is properly overruled, since the petition states a cause of action as to "moneys"; but entry of judgment as demanded is error, and should be reversed as to the "credits," with costs to the appellant.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered March 6, 1908, upon overruling a demurrer to the petition, granting a writ of mandate to require the listing of property for the purpose of taxation. Modified.

C. A. Pettijohn, for appellant.

Martin & Wilson (J. E. Frost, of counsel), for respondent. The constitutional provisions are mandatory. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820. The legislature has no authority to exempt any property from taxation. *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243. The act is void because the subject is not expressed in the title. *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. 769; *Lewis v. Dunne*, 134 Cal. 291, 66 Pac. 478, 86 Am. St. 257, 55 L. R. A. 833; *Harland v. Territory*, 3 W. T. 131, 13 Pac. 453; *State v. Southern R. Co.*, 115 Ala. 250, 22 South. 589; *State ex rel. Graham v. Tibbets*, 52 Neb. 228, 71 N. W. 990, 66 Am. St. 492; *State ex rel. Douglas County v. Cornell*, 54 Neb. 72, 74 N. W. 432; *State ex rel. Scott v. Bowen*, 54 Neb. 211, 74 N. W. 615; *State ex rel. Comstock v. Stewart*, 52 Neb. 243, 71 N. W. 998. The term "property" means everything of exchangeable value. *In re Tiburcio Parrott*, 1 Fed. 481; *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S. W. 955, 76 Am. St. 682, 56 L. R. A. 316; 6 Words & Phrases,

p. 5698; *Adams v. Jones*, 59 N. C. 221; *Sansbury v. State*, 4 Tex. App. 99; *State v. Carson City Sav. Bank*, 17 Nev. 146, 30 Pac. 708; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1; *McCurdy v. Prugh*, 59 Ohio St. 465, 55 N. E. 154; 27 Am. & Eng. Ency. Law (2d ed.), 637; 1 Cooley, Taxation, p. 645. The proviso permitting a deduction of debts from credits shows clearly that the framers of the constitution considered the question of debts and credits, and that they intended to include credits in the term "property", and as such, to compel its taxation. Const. art. 7, § 2; 2 Lewis, Sutherland Stat. Construction, p. 672. The question now before the court in this case was squarely passed upon by the supreme court of Utah in *Judge v. Spencer*, 15 Utah 242, 48 Pac. 1097. See, also, *State v. Armstrong*, 17 Utah 166, 53 Pac. 981, 41 L. R. A. 407, and *State v. Carson City Sav. Bank*, *supra*, which contains perhaps the ablest and most exhaustive discussion of the question at bar in which *People v. Hibernia Sav. & Loan Society*, 51 Cal. 243, 21 Am. Rep. 704, is disapproved.

The argument by which it is attempted to be shown that notes, bills, bonds, stocks, etc., are not property, is too sublimated and metaphysical to be practical in matters of legislation. *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 505; *New Orleans v. Mechanics & Traders' Ins. Co.*, 30 La. Ann. 876, 31 Am. Rep. 232. The statute violates the requirement of uniformity. 1 Cooley, Taxation, 357; *Pullman State Bank v. Manring*, 18 Wash. 250, 51 Pac. 464.

James B. Howe and *R. G. Sharpe*, amici curiae. The constitutional provision exempting the property of the United States, of the state, counties, school districts, and municipal corporations and "such other property" as the legislature may by general laws provide, is restricted to other property of the same general class, i. e., public or quasi public property; no other can be exempt from taxation. Const. art. 7, §§ 1, 2; *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111,

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49 Pac. 243; *Buchanan v. Bauer*, 17 Wash. 688, 49 Pac. 1119; *Pullman State Bank v. Manring*, 18 Wash. 250, 51 Pac. 464. A constitutional provision that all property shall be subject to taxation except certain exempted kinds therein enumerated, amounts to a prohibition against exempting other property. *Fletcher v. Oliver*, 25 Ark. 289; *Mackay v. San Francisco*, 113 Cal. 392, 45 Pac. 969; *Morrison v. Larkin*, 26 La. Ann. 699; *Trustees v. McConnel*, 12 Ill. 138; *Minturn v. Hays*, 2 Cal. 590, 56 Am. Dec. 366; *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143; *Chesapeake & Ohio R. Co. v. Miller*, 19 W. Va. 408; *State v. Armstrong*, 17 Utah 166, 53 Pac. 981, 41 L. R. A. 407; *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102; *Charlotte Bldg. & Loan Ass'n v. Commissioners of Mecklenburg County*, 115 N. C. 410, 20 S. E. 526. The legislature cannot by an attempted definition of the word "property" exempt from taxation any form of property which the constitution intended should be taxed. *State v. Armstrong, supra*. The expression "property" as used in the constitutional provision cited, includes mortgages, and an attempt on the part of the legislature to exempt the same is void. *Judge v. Spencer*, 15 Utah 242, 48 Pac. 1097; *State v. Carson City Sav. Bank*, 17 Nev. 146, 30 Pac. 703; *Stebbins v. Stebbins*, 86 Mich. 474, 49 N. W. 294. Notes, accounts, certificates of deposit and tax certificates are "property" within the meaning of the term as used in the above constitutional provisions. 6 Words and Phrases, pp. 5703, 5717, and cases cited; *Kingsley v. Merrill*, 122 Wis. 185, 99 N. W. 1044, 67 L. R. A. 200; *Manning v. Berdan*, 132 Fed. 382; *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 111 La. 982, 36 South. 91; *State v. Carson City Sav. Bank, supra*; *People v. Hibernia Sav. & Loan Society*, 51 Cal. 243, 21 Am. Rep. 704; *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143; *People v. McCrerry*, 34 Cal. 432. The expression "property" as used in the constitutional provisions referred to includes state and municipal bonds and warrants. *Bork v. People*, 91 N. Y. 5; *People ex rel. Manhattan Fire*

Ins. Co. v. Board of Com'rs, 76 N. Y. 64; *State Nat. Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. (N. S.) 663. Laws exempting property from taxation are to be strictly construed. 45 Am. Dig. 565; *Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 Pac. 252; *Sindall v. Baltimore*, 93 Md. 526, 49 Atl. 645; *Sisters of Charity v. Corey* (N. J.), 65 Atl. 500; *Schley v. Lee* (Md.), 67 Atl. 252; *Judge v. Spencer*, *supra*; *Wallace v. Board of Equalization*, 47 Ore. 584, 86 Pac. 365. The case of *State ex rel. Chamberlin v. Daniel*, *supra*, is *stare decisis* so far as this state is concerned on the proposition that the legislature has only the power to exempt public and quasi public property from taxation, and ought not to be deviated from unless grave necessity exists therefor. *State ex rel. Atkinson v. Ross*, 43 Wash. 290, 86 Pac. 575; *State ex rel. Hyland v. Peter*, 21 Wash. 243, 57 Pac. 814; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399; *McDonald v. Davey*, 22 Wash. 366, 60 Pac. 1116. Double taxation is not unconstitutional unless expressly prohibited by the constitution itself, and is not prohibited by our constitution. *Pacific Nat. Bank of Tacoma v. Pierce County*, 20 Wash. 675, 56 Pac. 936; *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261; *Lewiston Water & Power Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544. The fact that there has been on the statute books a law exempting mortgages from taxation, is not an argument in favor of the validity of such exemption. *Wallace v. Board of Equalization*, *supra*. As the constitution expressly authorizes "a deduction of debts from credits," the taxation of credits was intended. Const. art. 7, § 2; *Pullman State Bank v. Manring*, *supra*.

J. H. Easterday, Peters & Powell, and *Hudson & Holt*, *amici curiae*. The requirements of uniformity, equality, and justness cannot be fully met. *Lewiston Water & Power Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544; *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261. Nothing can

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be added to the wealth of the state by the multiplication of credits. *People v. Hibernia Sav. & Loan Society*, 51 Cal. 243; *Savings & Loan Society v. Austin*, 46 Cal. 415. The constitutional requirement of equality and uniformity only extends to such objects of taxation as the legislature shall determine to be properly subject to the burden. Cooley, Constitutional Limitations (7th ed.), p. 742. Taxes are both "equal and uniform" when no class of persons are taxed at a higher rate than are other persons in the same district, upon the same value or thing. *Norris v. Waco*, 57 Texas 635; *Daily v. Swope*, 47 Miss. 367. In the absence of constitutional restrictions, the legislature may create exemptions. 12 Am. & Eng. Ency. Law (2d ed.), p. 272. Where the legislature has clearly intended to create an exemption, the validity of that act must be assumed. 12 Am. & Eng. Ency. Law (2d ed.), 274. The court admits in the *Chamberlin* case that it is within the legislative power and jurisdiction to exempt certain classes of property, although they do not strictly come within the rule of *ejusdem generis* announced in that case. Page 122 of *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243. The strict rule of construction applied to statutes does not apply to constitutions. Endlich, Interpretation of Statutes, § 526. State, county and municipal bonds, and warrants, the highest forms of credits, have long been considered subjects for express exemption from taxation even where, under constitutions, it was expressed that "all property, real and personal," is subject to taxation. *State ex rel. Daponte v. Board of Assessors*, 35 La. Ann. 651; *Miller v. Wilson*, 60 Ga. 505; Judson, Taxation, p. 72, par. 72; Opinions of the Attorney General, 1905, p. 232, 234; 1891, vol. 1, p. 59; *First Nat. Bank of Aberdeen v. Chehalis County*, 6. Wash. 64, 32 Pac. 1051; *Puget Sound Nat. Bank of Seattle v. Seattle*, 9 Wash. 608, 38 Pac. 219. In case of doubt in the construction of the constitution, resort may be had to the context, and weight given contemporaneous legislative construction. *People ex rel. Badger v.*

Loewenthal, 93 Ill. 191; Sedgwick, Statutory and Const. Law, 412; *People v. Green*, 2 Wend. 266, 274; *People ex rel. Livesay v. Wright*, 6 Colo. 97. In doubtful cases the doubt should be in favor of legislative power. *Bunn v. People ex rel. Laflin*, 45 Ill. 397. Especially when the legislative construction has been given to the constitution by those who framed its provisions and contemporaneous with its adoption. Sedgwick, Treatise on Statutory and Constitutional Law, p. 482. *Cordova v. State*, 6 Tex. C. A., 207, 445; *Collins v. Henderson*, 74 Ky. 74; *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588. The practical construction of the constitution, which has been adopted and followed in good faith by the legislature and people for many years, should have great weight with the courts. 10 Century Digest 15; *City of Faribault v. Misener*, 20 Minn. 401. Even if the act should be unconstitutional as to some subjects of property, it would not for that reason be invalid as to the rest. *State v. Poole*, 42 Wash. 192, 84 Pac. 727; *State ex rel. Matson v. Superior Court Skagit County*, 42 Wash. 491, 85 Pac. 264; *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 621, 102 Am. St. 885, 65 L. R. A. 336; *Pullman State Bank v. Manring*, 18 Wash. 250, 51 Pac. 464. Clerical errors in titles to amendatory acts are immaterial, provided the court can determine with certainty the statute, section or law intended to be revised. *Madison etc. Plankroad Co. v. Reynolds*, 3 Wis. 287; *Penberthy v. Lee* (Iowa), 8 N. W. 116; *State v. McCracken*, 42 Tex. 383; *School Directors of District No. 5 v. School Directors of District No. 10*, 73 Ill. 249; *Clare v. State*, 68 Ind. 17; *Citizens' Street R. Co. v. Haugh*, 142 Ind. 254, 41 N. E. 533; *Pue v. Hetzell*, 16 Md. 539; *The Borrowdale*, 39 Fed. 376.

HADLEY, C. J.—This action was instituted in the superior court of Lincoln county, and it is in the nature of an action in mandamus to require the assessor of that county to list for taxation purposes, for the year 1908, mortgages, notes, ac-

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counts, moneys, certificates of deposit, tax certificates, judgments, bonds, and warrants. In terms the petition asks for a writ of prohibition to prohibit the assessor from allowing the above-mentioned items to become exempt from taxation; but in effect the relief sought is affirmative and in the nature of mandamus. The assessor demurred to the petition, on the ground that it does not state facts sufficient to authorize the issuance of a writ. The demurrer was overruled, and in the absence of further pleading, judgment was entered commanding the assessor to list and assess all the items specified above. The assessor has appealed.

It is urged in support of the demurrer that it was the duty of appellant to refuse to list the items mentioned, by reason of the act of the legislature as found in chapter 48, at page 69 of the session Laws of 1907. Section 1 of that act is as follows:

"That section 8 of 'Chapter LXXXIII of the Laws of 1897, amended June 12, 1901, is hereby amended to read as follows: Sec. 3. Personal property, for the purpose of taxation, shall be construed to embrace and include, without especially defining and enumerating it, all goods, chattels, stocks or estates; all improvements upon lands, the fee of which is still vested in the United States, or in the State of Washington, or in any railroad company or corporation, and all and singular of whatsoever kind, name, nature and description, which the law may define or the courts interpret, declare and hold to be personal property, for the purpose of taxation, and as being subject to the laws and under the jurisdiction of the courts of this state, whether the same be any marine craft, as ships and vessels, or other property holden under the laws and jurisdiction of the courts of this state, be the same at home or abroad: *Provided*, That the ships or vessels registered in any custom house of the United States within this state, which ships or vessels are used, exclusively in trade between this state and any of the islands, districts, territories, states of the United States, or foreign countries, shall not be listed for the purpose of or subject to taxation in this state, such vessels not being deemed property within this state: *Provided*, That mortgages, notes, accounts, moneys,

certificates of deposit, tax certificates, judgments, state, county, municipal and school district bonds and warrants shall not be considered as property for the purpose of this chapter, and no deduction shall hereafter be allowed on account of an indebtedness owed."

It will be seen that the effect of the closing proviso of the section is to exempt from taxation the items there enumerated. If, therefore, the statute is a valid one, the appellant did his duty; but if it violates constitutional limitations, the judgment of the court was right. The constitutionality of the statute is the only question involved in this appeal.

It is contended that the act is invalid because of insufficiency of the title. The title is as follows:

"An act amending an act entitled, 'An act to amend section 3, of chapter LXXXIII of the Laws of 1897, relating to revenue and taxation,' passed the senate and the house June 12, 1901, notwithstanding the veto of the governor, and declaring an emergency."

If it is necessary to pay strict regard to everything contained in this title, then it is singularly involved. Reference to chapter 83 of the Laws of 1897, to which the title refers as the law amended by this act, discloses that it treats of monuments and notices upon mining claims. It is manifest that the reference to the former statute is a pure error, as the two acts relate to subjects entirely separate and distinct. This title does however further state the subject as "relating to revenue and taxation," and the body of the act clearly and succinctly treats of that subject alone. The subject of exemption from taxation treated in the body of the act is included in the general subject specified in the title. We think the erroneous reference to the former statute must be treated as mere surplusage, and inasmuch as without that part of the title there is a clearly stated and single subject which is followed by a clear treatment of that subject in the act itself, the statute becomes an independent one and has the effect of amending any existing statute upon the subject and of re-

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pealing by implication any previously existing provisions in conflict with it. We therefore hold that the act is not invalid by reason of its title.

It is further urged that the act violates §§ 1 and 2 of art. 7 of the state constitution. Section 1 contains, among other things, the following:

"All property in the state not exempt under the laws of the United States or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law."

Section 2 is in part as follows:

"The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: *Provided*, That a deduction of debts from credits may be authorized."

It is argued that the exemption of the items mentioned in the statute violates the constitutional provision of § 1 quoted above, which requires that all property in the state shall be taxed except such as is exempt under the laws of the United States or under the constitution of the state. It is contended that credits such as mortgages, notes, and accounts, are property and cannot be excluded by the legislature from the subjects of taxation. The argument assumes that all property in the state cannot be taxed without the taxation of credits. Is the assumption correct? The constitution simply requires — that all property shall be taxed, but the method of doing it is left to the legislature. If the method devised by the legislature reaches all property in fact, then there is no violation of the constitution. It is possible to assess the same property in different ways any one of which would subject the entire property to the tax. For example, one person may own the fee title to real estate and another may own an easement or a

leasehold therein. All of these are property, but it cannot be successfully maintained that all of them must be taxed in order to satisfy the constitution. The state taxes the land as an entirety and leaves the owners of the several interests to make such adjustments as they choose. The constitutional requirement that all property shall be taxed is certainly satisfied through a method by which the total of all wealth in the state is once taxed. Double taxation should be avoided as far as possible, and in any event the constitution should not be so construed as to require it. In an effort to tax all property it is, however, difficult to avoid double taxation in some particulars. The complexity of established business methods is such that property appears and then reappears in representative forms. The actual property of a corporation reappears in the hands of its stockholders in the shape of corporate stock. That the taxation of the corporate property and also of its capital stock amounts to double taxation was recognized by this court in *Lewiston Water & Power Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544. The court observed in that case as follows:

"But, as we have seen, the assessment of the capital stock of a domestic corporation which has all its property in which the capital stock is invested already assessed is duplicate taxation, and this latter result will not be inferred without specific legislation. It may be further observed that § 1676, Bal. Code, in providing the method for the assessment of domestic corporations such as this, does not contemplate duplicate taxation."

See, also, *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261.

All the provisions of the constitution on the subject of taxation cannot be fully and literally met. For purposes of present consideration these provisions may be stated as follows: "All property" shall be taxed. The assessment shall be "uniform and equal," and a "just valuation" shall be placed upon all property, so that every person shall pay a tax in proportion to the value. No method of taxation in its

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results can fully accomplish all that the constitution declares shall be done. As near an approach to a full compliance as is reasonably possible is all that can be expected of the legislature. One requirement of the constitution is as mandatory in its nature as another. It is just as imperative that taxation shall be uniform and equal upon all property as it is that all property shall be taxed. It is manifest that a system which subjects some property to double taxation is not uniform and equal. Any method which can be devised by the legislature must necessarily be defective in some particulars and must fail to meet with exactness every standard set by the constitution. Any method adopted by the legislature which reasonably comprehends the taxation of all property once in some form, and which seeks to accomplish uniformity by avoiding double taxation as far as possible, should receive judicial sanction, for the reason that the constitutional provisions are harmonized by such a method as fully as complete harmony thereunder can be accomplished.

It will be seen that the items specified by the statute of 1907 which shall not be considered as property for the purposes of assessment and taxation, may all be classified as "credits," except the item of "moneys." So far as credits are concerned, if it is demonstrable that the total wealth of the state can be once taxed without the taxation of credits in any form, we think the constitution is satisfied without the taxation of credits. The multiplicity of credits does not add to the property wealth of the state. If A buys of B a piece of real estate and agrees, by promissory note or otherwise, to pay \$5,000 therefor, there is as a result in the hands of B a credit in the amount of \$5,000, but there is not thereby created \$5,000 more property or wealth. By the transaction the land has passed from B into the possession and control of A and is taxable the same as if it had remained with B. The credit in the hands of B is a matter of no value or consequence, except for the prospect or faith that A will in the future deliver to B \$5,000 in actual money or other prop-

erty. That money or property that may in the future come to B is still in the hands of A or some one else from whom A will procure it; and it is meanwhile taxable at some place, wherever it may be, no matter who possesses it or controls it, whether within or without this state. The credit in the hands of B is simply the right to demand the delivery of \$5,000 worth of property at some time in the future. To tax both this right and the property which it represents is clearly double taxation.

A similar illustration applies to a loan of money. At this point it is proper to remark that we think moneys cannot properly be classified with credits as is done in the statute of 1907. Money in practical commercial operations possesses such value by way of immediate purchasing or exchange powers as in effect robs it of a mere representative character and clothes it with the dignity of property having intrinsic value. We therefore think that the proviso in question must be held to be inoperative so far as money is concerned, since to exempt it from taxation would amount to a palpable effort to avoid the taxation of all property. Recurring now to the illustration as to a credit created by the loan of money, we will suppose that A borrows from B \$5,000 in cash. A, instead of B, becomes the possessor of the money, and either it or its equivalent in other property which it purchases for A becomes taxable in the latter's hands. To tax the money in A's hands and also the mere right which B has to call upon A for its repayment is clearly double taxation. These illustrations it is believed should apply to all credits. Credits are in effect the mere legal right with which one is clothed to demand the delivery of money or other property in the future, and until such transfer of possession is made, that property is taxed wherever it may be. Thus the total actual property or wealth of the state may be once taxed without the taxation of credits, and the constitutional requirement is thereby fully met.

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In *People v. Hibernia Bank*, 51 Cal. 243, 21 Am. Rep. 704, it was held, under constitutional provisions similar to ours, that credits are not property subject to taxation, within the meaning of the constitution which provides for the uniform taxation of all property in the state in proportion to its value. It is not necessary in order to sustain our statute of 1907 that it should be held, as was done in California, that the legislature cannot in its discretion provide for the taxation of credits. It is sufficient to say that the omission of credits from a scheme of taxation does not violate the requirement that all actual property shall be taxed. It is argued that *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111, 49 Pac. 243, is decisive of this controversy in favor of respondent. The act there under consideration exempted from taxation in the hands of each person \$500 of personal property and \$500 of improvements upon land. It will be seen that the act exempted actual property, and its enforcement would have deducted a large amount from the aggregate of the actual property wealth of the state as not taxable, thus plainly violating the requirement that all property shall be taxed. We have seen that the statute under discussion in the case at bar does not prevent the taxation of the total wealth of the state once, but it does prevent double taxation by way of assessing credits. The case cited is therefore not in point upon the question presented here.

It is urged that the makers of our constitution must have intended to declare that credits are property which must be taxed, from the fact that § 2 of art. 7, *supra*, provides that "a deduction of debts from credits may be authorized." It is insisted that the above words are a clear constitutional recognition of credits as property. If, however, we should recognize the argument as forcible and should undertake to adopt it, we should at once be met with the requirement in the same section that all taxation shall be uniform and equal. We have seen that the taxation of credits violates uniformity and —

equality and effects double taxation. The great and principal subject treated in the section is that of uniformity and equality of taxation. It overshadows everything else, and whatever else is mentioned in the section is merely incidental to the main subject. Having reference to the main subject, it cannot be held that uniformity can be preserved if the constitution means that credits *must* be taxed. It is our duty to adopt such construction as will most nearly harmonize all provisions in the section, with the evident chief purpose sought to be accomplished.

With the mere policy of the statute, the courts have nothing to do, except in so far as the same may throw light upon the legislative intention. It may be stated in this connection, as a matter of common knowledge, that one of the most fruitful sources of inequality in taxation is the attempt to tax credits. Laws for that purpose can never be effectively enforced. Efforts to conceal the existence of the credits are so successful that a few honest persons pay the taxes and the large majority of holders do not. Moreover, in practical experience, the tax is not really paid by the holders of the credit, but it is paid by his debtor. When mortgages are taxed, the mortgagee seldom pays the tax, but the burden thereof is imposed upon the mortgagor by way of increased rates of interest or otherwise, and the same may be said as to increased rates of interest imposed upon borrowers generally. Such results cannot well be avoided, and doubtless the legislature had such considerations in mind as supporting the policy of this law. It was no doubt believed that all the wealth of the state can be once taxed without the taxation of credits, and that with the constitutional requirement as to taxation of all property thus satisfied, uniformity and equality can be the better effected and the abuses above mentioned largely corrected.

We therefore think, for the foregoing reasons, that the statute is not unconstitutional, except in so far as it attempts to exempt moneys from taxation. That, however, does not invalidate the other provisions, as has been often held. The

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general demurrer was properly overruled, inasmuch as a cause of action was stated so far as listing of moneys is concerned, but the judgment should be modified so as to command the respondent to list all moneys for taxation, and further provide that all credit items mentioned in the statute of 1907 shall be excluded from the assessment lists. It is so ordered, and the cause is remanded with instructions to so proceed. The appellant shall recover the costs on appeal.

RUDKIN, DUNBAR, CROW, and MOUNT, JJ., concur.

FULLERTON, J. (dissenting)—I am compelled to dissent both from the conclusion and judgment in this case. The decision is rested, as I understand it, on three propositions: (1) that credits are not property; (2) that to tax credits violates the principle of equality and uniformity in taxation required by the constitution; and (3) that credits are taxed by the taxation of the tangible property of the state. As the questions decided are important, I feel justified in briefly stating the grounds of my dissent.

(1) The constitutional provisions on the subject of taxation appropriate to the questions before the court are set out in the majority opinion, and need not be reproduced here. A reading of them makes it at once manifest that it was the purpose and intent of the framers of the constitution, as well as that of the people who adopted it, to require for the purposes of revenue the taxation of all private property in the state, of whatsoever kind or nature, equally and uniformly, in proportion to its value in money. The language is explicit. It admits of no limitation or construction. "All property" is named, and the only exception provided for is that a deduction of debts from credits may be authorized. The questions, therefore naturally arise what is meant by the word "property" and in what sense was the word used in the constitution?

That mortgages, notes, accounts, moneys, certificates of deposit, tax certificates, judgments, state, county, municipal

and school district bonds and warrants, are property in the general and popular sense of that term hardly admits of doubt. They are so termed and considered by all English-speaking people, by all law writers, and by the entire commercial world. They are held by the courts to be protected against spoliation and theft by the statutes which make it a crime to despoil or steal personal property. The question of ownership and title to them is daily the subject of controversy in the civil courts. They are daily the subject of barter and sale in all the marts of commerce. They have value in money, and constitute and make up the most satisfactory character of wealth that mankind possesses. In fine, they have all the attributes of property. These propositions are matters of common knowledge, and citations of authorities are not necessary to establish them.

That the word "property" was used in the constitution in its general sense seems to me also to be free from doubt. It is a cardinal rule of construction that the language of a state constitution, more than that of any other written instrument, is to be taken in its general and popular sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and its words have meaning as they commonly understand them. When, therefore, words are used which have both a general and a technical sense the former must prevail over the latter, unless the very nature of the subject-matter indicates, or the context suggests, that the technical sense was intended. In the sentence on which the word "property" is used in the constitutional provision quoted there is no attempt at definition. It is used without connection with any sentence or phrase which limits its meaning. Nor is there elsewhere any limitation upon its meaning. Indeed, there is no reason for concluding that the word was used other than in its general sense.

That the makers of the constitution had the right to provide for the taxation of credits, if they so desired, I think will be conceded. It will be conceded also that this could be done

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by the use of general terms. Therefore, it being true that the obligations here enumerated are "property" in the general sense of that term, and it being true that the constitution makers used the term "property" in its general sense, it must follow that the constitution requires the taxation of these obligations.

But there is another reason more potent to my mind than even the foregoing, which shows that the framers of the constitution intended to provide for the taxation of credits by the use of the general term "property." They authorized the legislature, when providing the method of taxation, to allow a deduction of debts from credits. Clearly, if it had not been understood that credits were property and taxable as such, this deduction would not have been authorized.

(2) Does the taxation of credits violate the principle of equality and uniformity in taxation required by the constitution? The affirmative argument is, that to tax these obligations is double taxation. Thus it is said that if A loans B \$5,000, and takes B's obligation to repay that sum, it is double taxation to tax the obligation in A's hand and the money in B's. But if this be true, and the obligation be property, I cannot understand how the rule of uniformity and equality is advanced by exempting the obligation. It seems to me that this but further confuses the matter. It cannot be said that the obligation is doubly assessed. If any property is doubly assessed it is the money, and to exempt the obligation exempts the wrong thing. But it is not sound for another reason. When A, the money loaner, loans to B, the borrower, \$5,000, and takes his obligation to repay the loan, A's wealth is not thereby decreased \$5,000, nor is B's wealth increased \$5,000. The parties have only made an exchange of wealth, and each has exactly the same amount of wealth he had before. If, therefore, each paid taxes on \$5,000 before the exchange, in justice and equity each ought to pay taxes on a like amount thereafter. The law as it heretofore existed, however, seems to have made A pay, after the ex-

change, on \$5,000 and B on \$10,000. To correct the evil the legislature relieves A entirely, still leaving B to pay on double the amount he possesses. This to my mind is not equality and uniformity in taxation. Nor do I think any law can equalize taxes which exempts from taxation the creditor class. The burden of double taxation never falls upon them. It falls in every instance upon the property-holding debtor class, since it is the debtor who does not have the absolute interest in the property he possesses. Laws which allow the debtor to deduct from the assessed value of his property debts in good faith owing by him have, for that reason, a sense of equity, but there is no sense of equity or justice in exempting from taxation money and credits.

(3) Finally, it is said that credits are taxed in other forms of property, and for that reason their exemption from taxation as credits is justified. The argument in support of this proposition is that credits are but representations of interests in the tangible property of the state, and that when the tangible property of the state is taxed all the wealth within the state is taxed. But I must dissent from this proposition also. It assumes, what is obviously not the fact, that there is no wealth in credits independent of tangible property. Suppose that tomorrow a person should come into this state from some other state bringing with him stocks and bonds to the value of a million dollars of some solvent railroad corporation whose lines do not touch this state, would any one say that he had brought no wealth into the state, or that the wealth of the state had not been increased? Or, would any one say that these stocks and bonds were taxed by the taxation of the tangible property of the state? Obviously not. How then can it be said that the wealth of the state is taxed by the taxation of its tangible property? It is no answer to say that these bonds are taxed by the taxation of the railroad in another state. This does not satisfy our own laws which require that all property within the state be taxed. Nor does it satisfy the justice of the matter. So long as this

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property is within the state it requires the care and protection of the laws of the state, and it is only right that it should contribute its proportionate share to the maintenance of the state. Furthermore, if credits be property in any form, they must be taxed as property. The constitution does not recognize vicarious taxation. The requirement that all property must be taxed means that it must be taxed directly, in the form it presents itself when the assessment lists are made up, not in the form of substitutes.

Again, it is suggested in this connection, and it is a common argument used in support of laws of this character, that credits escape taxation in the major part through the dishonesty of their holders, and that, when they are found, the tax is paid by the debtors in the way of increased interest. But this does not appear to me to argue in favor of the exemption of credits. If the laws are so lax as to permit credits to escape taxation, the remedy is to reform the law, not to exempt credits. It will not do to say that no tax law can be framed that will reach credits. This is no place to point out remedies, but when the law places the premium upon honesty instead of upon dishonesty in these matters, the evil will disappear. But, supposing it be true that a goodly part of the credits of the state will escape the assessor under the best framed law, is it not better that the part that can be reached be taxed than that all be allowed to escape? No one pretends that the assessor reaches all of the tangible personal property in the state, yet I have never heard this given as a reason for the exemption from taxation of all tangible personal property.

The claim that the borrower pays the taxes on credits in the way of interest is only true in a general sense. It is true in the sense that the renter pays the taxes on rented land in the way of rents, that the builder pays the taxes on the manufacturing plants when he pays the cost of the building material, that the consumer pays the tax on the products he consumes when he pays the price of the consumed products,

but it is true in no other sense. The rate of interest is regulated by law in this state, and it is this law that governs interest rates. Experience has shown that it is only by law that the exaction of excessive and exorbitant interest can be prevented. It is never done by freeing money and credits from taxation. Nor is interest lessened to any material extent thereby. This is so because freedom from taxation is only one, and a minor one, of the many conditions that regulate rates of interest. The maximum rate allowed by law is always exacted if the demand for money at the time justifies it, regardless of other conditions, and the fact that credits are or are not taxed is hardly considered as an element when determining whether the maximum rate shall be exacted.

But these latter considerations are beside the question. If the constitution declares that notes, accounts, moneys, certificates of deposit, and the like, are property and taxable as such, the legislature is without power to exempt them from taxation, and any statute attempting so to do is void. I believe it has so declared, and for that reason I think the judgment of the lower court should be affirmed.

[No. 7240. Decided August 3, 1908.]

J. P. RASMUSSEN, *Respondent*, v. H. LIMING *et al.*,
Appellants.¹

MECHANICS' LIENS—FORECLOSURE—PARTIES—ACTIONS—JOINDER OF CAUSES—PERSONAL JUDGMENT AGAINST CONTRACTOR—HUSBAND AND WIFE. In an action to foreclose a mechanics' lien, it is proper to join as defendants the contractor who purchased the material and his wife, as a community, and the plaintiff is entitled to a personal judgment against them as for a community debt for the material purchased, as well as a lien against the property of the other defendants, without a jury trial; and the same would not be an improper joinder of causes of action.

¹Reported in 96 Pac. 1044.

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Opinion Per Crow, J.

Appeal from a judgment of the superior court of Pierce county, Clifford, J., entered November 6, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enforce a materialman's lien. Affirmed.

Lueders & Phelps and *L. C. Whitney*, for appellants.

E. D. Wilcox, for respondent.

Crow, J.—This action was commenced by J. P. Rasmussen against H. Liming, Eliza Liming, his wife, Andy Hanson, Amy Hanson, his wife, and H. W. Jaeger, defendants, to foreclose a materialman's lien on real estate in the city of Tacoma. From a judgment and decree in favor of the plaintiff, the defendants have appealed.

Appellants, by their first assignment, contend that the trial court erred in overruling their demurrer to the complaint, for the reason that two causes of action were improperly joined. The complaint shows that the appellant H. Liming was the contractor, employed by the appellants Andy Hanson and wife to furnish material and build a dwelling house upon their lot, the same being the lot involved in this action, and that the respondent furnished certain hardware to Liming for use in the house, on its credit, and in so doing relied on his right to a lien. In his complaint the respondent made the appellant Eliza Liming a party defendant because she is the wife of the contractor H. Liming, and alleged that in building the house the husband was acting for the benefit of the community. Respondent demanded a personal judgment against Liming, asked that it be declared the community obligation of Liming and wife, and that he be decreed a lien therefor and a foreclosure under a statutory notice which he had filed. Appellants insist that this was a misjoinder, that the respondent had improperly joined a cause of action against the appellants Liming and wife for goods sold and delivered, on which they were entitled to a jury trial, and in

which Hanson and wife, as owners of the lot, and Jaeger as a mortgagee were not concerned, with another cause of action against the appellants Hanson and wife and Jaeger to establish a lien on the real estate, in which the appellants Liming and wife had no interest, and by which they were in no way affected.

There is no merit in this contention. The allegations of the complaint disclosed that all of the items included in respondent's claim against Liming and wife, for materials sold, were lienable, and that they were sold for use in, and were actually used in, the construction of a dwelling house on the lot of the appellants Hanson and wife. Under these allegations there was no misjoinder of causes of action. All the parties named were properly made defendants, and their respective rights and liabilities were properly submitted for joint trial in this equitable action, in which the respondent would be entitled not only to a personal judgment against the appellant Liming, but also to a decree foreclosing his lien in the event that the evidence sustained the other allegations of his complaint.

Several assignments of error are based on rulings of the trial judge in admitting and rejecting evidence. We find that no prejudicial error was committed in this regard.

The appellants' principal contention seems to be that the evidence does not sustain the findings of fact made and entered by the trial judge. The respondent alleged that the last item of hardware was sold and delivered on December 29, 1906, and that his notice of lien was filed with the auditor of Pierce county within ninety days thereafter, on March 26, 1907. Appellants contend that the last item was sold and delivered by the respondent on December 7, 1906. If this contention had been sustained by the evidence, it would necessarily follow that respondent's notice was not filed within the statutory time, and that he would not be entitled to any lien. Upon the issue as to when the last item was sold and delivered, the evidence was conflicting, but the trial judge found in favor of the respondent.

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Statement of Case.

We are satisfied after a careful examination of the entire record that this and the other findings are sustained by the preponderance of the evidence; also, that they support the final judgment, which is affirmed.

HADLEY, C. J., ROOT, FULLERTON, and MOUNT, JJ., concur.

[No. 7234. Decided August 4, 1908.]

C. S. VAIL, *Appellant*, v. HENRY McGUIRE *et al.*,
Respondents.¹

EVIDENCE—JUDICIAL NOTICE—GEOGRAPHICAL FACTS. The court will take judicial notice that the Snohomish river is a tributary to Puget Sound, and of the ebb and flow of the tide below the city of Snohomish.

FISH—PUGET SOUND—ESTUARIES—FISHING LOCATIONS—STATUTES—APPLICATION. Fishing locations within the ebb and flow of the tide in Snohomish river are in the waters of Puget Sound, within our statutory definitions of Puget Sound, which include all portions of tide waters emptying into the Straits of Fuca, and the bays, inlets, streams, and estuaries thereof (Bal. Code, § 7381) or emptying into the bays and estuaries thereof (Bal. Code, § 3343); an estuary being that portion of the lower course of a river subject to tides.

SAME—FISHERIES—LOCATIONS—REQUISITES—SURVEYS—RIGHTS ACQUIRED. Laws 1895, p. 255, § 2, requires that an accurate survey and map be prepared and filed of set-net fishing locations in the waters of Puget Sound, and a locator failing to comply with the provisions of the statute is not entitled to an injunction to protect his location, as the same constitutes such property as may be held only by continued compliance with statutory regulations.

Appeal from a judgment of the superior court for Snohomish county, Honorable John Sandidge, judge *pro tempore*, entered August 26, 1907, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Affirmed.

E. C. Dailey, for appellant.

O. T. Webb, for respondents.

¹Reported in 96 Pac. 1042.

HADLEY, C. J.—This is an action to enjoin the defendants from interfering with two set-net fishing locations, claimed by the plaintiff. The cause was determined by the trial court upon demurrer to the complaint, the demurrer being sustained and the action dismissed. The complaint alleged that, in June, 1907, the plaintiff posted the numbers of his licenses on the bank of the Snohomish river, in Snohomish county, describing the place of one location as “at a point in said river opposite and just above the land owned by the defendant Henry McGuire, and on the right of way of the county road, same being on the opposite side from a point known as Mudgett’s mill and about three miles down the river from the city of Snohomish in said county and state.” The other location is described with reference to the first as being “further down the said river and opposite land owned by the said defendant Henry McGuire, Sr.” It is alleged that, on or about the 30th day of July, 1907, the plaintiff began fishing with the nets at the aforesaid locations, and that on the 11th day of August, 1907, the defendants, with full knowledge of all the plaintiff had done in the premises, forcibly took possession of the fishing locations, and that in like manner they still withhold the possession thereof from the plaintiff. We have stated the entire description of the locations above, and it will be noted that there is an entire absence of averment that any surveys of the locations were made by a competent civil engineer, or that location maps containing plats or descriptions of the locations sufficient for their identification on the premises, were made, certified by such engineer and by the occupant or claimant, and filed in the office of the county auditor of Snohomish county, and also a copy with the fish commissioner of the state of Washington. The trial court, as the briefs seem to concede, held that the absence of any averment as to the survey, maps, and filing rendered the complaint demurrable, and showed no right in the plaintiff to demand injunctive relief. The plaintiff has appealed.

Reference to § 2, p. 255, *et seq.*, of the Laws of 1895, dis-

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closes the imperative necessity for an accurate survey of all set-net locations, and the preparation and filing of maps as above indicated. That section is an amendment to § 9, p. 203, of the Laws of 1899. The act of 1899 was a general one, relating to the propagation of the food fishes and regulating the catching thereof in the waters of this state. Appellant contends that the provisions of that statute, and also of the amending statute of 1905, by their terms were intended to be confined to the waters of Puget Sound, and that they do not apply to tributaries thereof, such as the Snohomish river. He therefore concludes that the statutory requirements as to survey of locations do not apply to the locations in question. The amending statute of 1905, providing for surveys, does appear to be specifically limited to fishing locations "in the waters of Puget Sound in the state of Washington." The court takes judicial notice of the fact that the Snohomish river is tributary to Puget Sound, and that the described locations, being three miles below the city of Snohomish, are within the area of the ebb and flow of the tide.

"Courts have judicial knowledge of the prominent geographical features of the territory over which, or state in which, they exercise jurisdiction and of the country at large; the location of cities outside the state, at least if they are well-known commercial centers, and their situation as related to tide water. Geographical facts of common knowledge relating to cities of commercial importance within the jurisdiction of the court need not be proved. . . . Courts take judicial notice of the existence and location, within the states in which they exercise jurisdiction, of great lakes and rivers and their relation to county or city lines and to the distribution of population; of the navigability of streams constituting great national highways of commerce as well as of smaller streams within the jurisdiction, and other notorious facts concerning the latter." 16 Cyc. 858, 862.

Inasmuch as the locations are within the area of tide water, are they within Puget Sound, so as to come within the scope of the statute? Respondents call our attention to a statutory

definition of Puget Sound, as found in Bal. Code, § 7381. It is as follows:

“For the purpose of more clearly defining the provisions of the last section, all that portion of the tide waters emptying into the Straits of Fuca, and the bays, inlets, streams, and estuaries thereof, shall be known and designated in this article as Puget Sound.”

This statute was passed in 1890, and it will be seen that the definition specifically includes streams tributary to the waters emptying into the Straits of Fuca, and is unlimited as to any particular part or parts of the streams. The section specifically refers, however, to the previous section, which makes it unlawful at certain times to take salmon in any of the streams flowing into Puget Sound. The manifest intention of the two sections is to protect the salmon for propagating purposes, and this subject necessarily includes prohibitive rules in the purely fresh water parts of the streams as well as those directly affected by the tide and salt water. While it may be argued that the above definition broadly includes the whole of tributary streams, and declares them to be actual parts of Puget Sound, yet when we consider the connection in which the definition is used, such a construction may be too broad for application to the subject-matter before us. A statutory definition of Puget Sound of longer standing than the above is found in the Code of 1881, § 1174, and in Bal. Code, § 3343 (P. C. § 1820). It is as follows:

“For the purpose of more clearly defining the provisions of this article, all that portion of the tide waters emptying into the Straits of Fuca, and the bays and estuaries thereof, shall be known and designated as Puget Sound.”

It will be observed that streams are not mentioned specifically in the above definition, but the “bays and estuaries” of the tide waters are included. The Century Dictionary defines an estuary as follows: “That part of the mouth or lower course of a river flowing into the sea which is subject to tides; specifically, an enlargement of a river channel toward its

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mouth, in which the movement of the tide is very prominent." Under the above definition of an estuary, we think appellant's locations are within the estuary of the Snohomish river, and, certainly, when both the statutory definitions of Puget Sound, quoted above, are considered together, it must be held that appellant's locations are included in its waters and are subject to the fishing regulations provided therefor, which include the requirements for the survey of locations provided by the statute of 1905.

Inasmuch as the appellant has failed in essential particulars to comply with the law entitling him to hold these fishing locations, he has no standing to ask injunctive relief against others who seek to occupy them. He does not show any other right by which he may hold them, and, indeed, it may be conceded that fishing locations of this character constitute such property as may be held only by continued compliance with the statutory regulations governing the subject.

For the foregoing reasons we believe the judgment was right, and it is affirmed.

FULLERTON, MOUNT, and ROOT, JJ., concur.

[No. 7307. Decided August 6, 1908.]

LEON CHARON *et al.*, *Respondents*, v. JAMES W. CLARK *et al.*,
Appellants.¹

WATERS AND WATER COURSES — ARTESIAN WELLS — DIVERSION — GRANTS OF WATER RIGHTS. The rule that an action does not lie for intercepting or diverting subterranean waters does not apply where the predecessors in interest had defined their rights by a deed conveying a specified flow of a portion of the water from an artesian well to be used for irrigating purposes; and injunction lies to prevent diversion of the amount agreed by deed to be delivered.

SAME—PRIORITIES. Where several grants are made to portions of the water from an artesian well, the first grantee, who received a specific amount, takes a definite estate therein, and subsequent grantees with notice hold subject thereto.

¹Reported in 96 Pac. 1040.

Appeal from a judgment of the superior court for Yakima county, Rigg J., entered September 23, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for an injunction. Affirmed.

Wm. M. Thompson, for appellants.

Fred Parker and Thomas E. Grady, for respondents.

HADLEY, C. J.—This is a suit to enjoin interference by the defendants with the flow of water from an artesian well to land of plaintiffs. The plaintiffs are the owners of a tract of land in Yakima county, which is arid and will not produce crops without irrigation. They have all of the land under cultivation, and for twelve years they and their predecessors have raised valuable crops thereon. During all those years water from the artesian well has been used for the irrigation of crops and for domestic uses upon the land, which is entirely dependent upon the well as a source of water supply. The defendants are now the owners of a small tract of land containing 4.56 acres upon which the well flows to the surface of the ground. This tract, together with other surrounding ones, was formerly owned as one entire tract by a single owner, one McDonald. At various times prior to the time McDonald conveyed the small tract of land upon which the well flows to the defendants' grantor, he made other conveyances of part of the original entire tract owned by him to various persons, and executed a number of conveyances purporting to convey to various individuals certain amounts of water, or perpetual rights to the use of certain quantities of water, from the well for irrigation and domestic uses, on the respective tracts of land theretofore conveyed by him. It is stipulated in the case that, through McDonald as a grantor and through various mesne conveyances purporting to convey certain amounts of water, the plaintiffs can deraign title to an amount of water flowing from this well equal to eighteen

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and three-fourths inches miner's measure, under a four-inch pressure, delivered at the highest point on the plaintiffs' land. The plaintiffs became the grantees of this water supply, and were in the possession and enjoyment thereof prior to the time the defendants became the owners of the immediate tract upon which the well flows. The deed under which the defendants claim contained the following condition:

"Subject, however, to all existing rights of divers persons to take water from the artesian well located upon said premises. Also subject to all rights of way for irrigating ditches as now constructed and existing through, over, and upon said conveyed premises."

Upon the foregoing facts, the trial court held that the plaintiffs are the owners of eighteen and three-fourths inches of water, miner's measure, under a four-inch pressure, flowing from said well; also, of the right of way through defendants' land for the conveyance of that amount of water to the plaintiffs' lands, and that plaintiffs are entitled to an injunction perpetually enjoining the defendants from in any manner interfering with the flow of the water to the plaintiffs' lands. From a judgment of the foregoing effect, the defendants have appealed.

Appellants contend that no perpetual rights or estates in the water were conveyed by McDonald's several conveyances. The source of water supplying this well, it is argued, is entirely subterranean and reaches the well through percolation. Its course is indefinite, uncertain, unknown, and appellants seek to apply here general rules which have been applied in some cases to subterranean percolating waters. They suggest that the law with respect to such waters was not developed until a comparatively recent period, and that all rules governing the subject cannot be regarded as settled at the present time. They argue that it is now established that an action will not lie to prevent a person from diverting percolating subterranean waters. A discussion of the authorities cited upon this general subject of the mere naked right of

an ordinary landowner to divert such waters without regard to any relations arising out of contracts, we think, is unnecessary and inappropriate here, by reason of the relation of these parties. The parties here stand in the relation of grantors and grantees. Appellants stand in the shoes of respondents' grantor. They accepted their deed, under which they claim title, expressly subject to the burden of respondents' water right which had been granted by their grantor. The following statement of the rule applicable in such cases is clear and to the point:

"The rule that an action will not lie against a person for intercepting or diverting subterranean waters does not apply where the rights of the parties are defined by a deed or other instrument, by which the person diverting or intercepting such waters has previously conveyed all water in a certain close, as his right must be ascertained from the instrument alone; and if it conveyed the subterranean water, the grantor is liable for subsequently diverting or intercepting it. Therefore the grant of a well or a spring may be in such form as to preclude the grantor from doing any act which will interfere with the enjoyment of the thing granted. . . . But a grant of the right to water as then conducted from certain springs will prevent the grantor from doing anything on his remaining land which will cut off the water supply. So, a deed of wells, one discharging into the other and both drawn from by a pipe to the grantee's buildings, which in express terms conveys also all right and title to water naturally flowing into them, passes the right to percolating subsurface supplies, and the grantor and his successors in interest are answerable if, on the adjoining land, they so act as to cut off or diminish the underground sources." 3 Farnham, *Waters and Water Rights*, § 943.

The following authorities support the rule above stated: *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16, 25 Am. Rep. 125; *Whitehead v. Parks*, 2 H. & N. (Eng.) 870; *Paine v. Chandler*, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99; *Minnard v. Currier*, 67 Vt. 489; *Davis v. Spaulding*, 157 Mass. 431, 32 N. E. 650, 19 L. R. A. 102. In the last-cited

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case, it is true, it was held that the grant of an easement to draw water from a well by a pipe laid in the ground, as used at the time of the grant, through which the water flowed by gravitation, does not preclude the grantor or his subsequent grantee from digging another well on his own land, although the result may be to destroy the value of the easement by diversion of the water which formerly percolated into the well. The grant in that instance was, however, a mere easement or privilege of maintaining the pipe and drawing water therefrom. There was no definite grant of a specified quantity of water, and no covenant that the remaining estate should be burdened to supply it. The principle hereinbefore stated is fully recognized in that case as obtaining in all cases where there has been a clear intention expressed in definite terms by grant to burden the remaining estate with the servitude of maintaining a definite quantity of water for the conveyed estate. In the case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, the argument is made that water, gas and oil belong to the owner of the land, and are a part of it so long as they are on it or in it, and are subject to his control; but when they escape and go on or into other land, or come under another's control, the title of the former owner is gone. That decision was in relation to natural gas, but the court classified water, gas, and oil as minerals *ferae naturae* and as all subject to the same rules. There was, therefore, an ownership in the water which was conveyed by respondents' grantor. The water is a part of the land so long as it is on the land or in it, and it was definitely granted by the appellants' grantor. Appellants' conveyance was expressly made subject to the grant of the water estate. They accepted it as such, and must now abide by the burden which it imposes.

It is further contended that, in any event, the several grantees of the water rights must take subject to the rights of all others who have similar claims, and that if McDonald conveyed more than the actual amount flowing in the well, or if

the quantity of the flow is diminished, then each of the grantees of the water rights holds simply a correlative easement. We think the ordinary rules applying to grantors and grantees must apply here. The first grantee of a water right received a specific quantity of water and a definite estate, and each subsequent grantee, having taken with full notice of the estates held by prior grantees, must hold subject to those estates.

The judgment is affirmed.

FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7397. Decided August 6, 1908.]

EBERHARD ENGELKER, *Respondent*, v. SEATTLE ELECTRIC
COMPANY, *Appellant*.¹

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions that are covered in the general charge.

STREET RAILWAYS—NEGLIGENCE—VIOLATION OF SPEED ORDINANCE—COLLISION WITH VEHICLE—INSTRUCTIONS. An instruction to the effect that it would be negligence if a street car that collided with a vehicle was exceeding the speed limit in the business or settled district of a city, is not objectionable as authorizing a recovery regardless of the negligence of the plaintiff, when other instructions required that plaintiff be in the exercise of ordinary care.

SAME—VIOLATION OF ORDINANCE AS NEGLIGENCE. Violation of a city ordinance, by exceeding the speed limit in the business or settled district of a city, constitutes negligence.

SAME—INSTRUCTIONS. In an action for injuries sustained by the driver of a wagon in a collision with a street car, it is not prejudicial error in giving a requested instruction as to the plaintiff's contributory negligence, if the jury find that "the car was running at ordinary rate of speed" for the court to add "that is, not exceeding twelve miles an hour," which was the prescribed speed limit alleged to have been violated, when read in connection with other proper instructions as to the care to be exercised by the plaintiff.

¹Reported in 96 Pac. 1039.

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Opinion Per HADLEY, C. J.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 7, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in consolidated actions, for damages sustained in a collision with a street car. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

Brightman & Tennant, for respondent.

HADLEY, C. J.—Two actions involved in this appeal were tried together. One was to recover damages for personal injuries to the driver of a team, and the other to recover for injuries to the team, wagon and harness, the latter being owned by the driver and another, one Schmidt, as partners, doing business under the name of Star Bakery. The injuries resulted from a collision between one of appellant's street cars and the team and wagon driven by the plaintiff Engelker. It was alleged that the collision was due to the negligence of the defendant in the operation of its car. The defendant denied negligence on its part, and alleged contributory negligence on the part of the driver of the team. There was evidence to the effect that practically the entire east side of the street, from the sidewalk to the car track, was obstructed for some distance by reason of street repairs, so that teams could not be driven on that side of the street; that when teams came to this obstructed part of the street, they were compelled to drive onto the street railway track, and after passing the obstructions, they were turned back to the unobstructed driveway; that in this manner the team was being driven around the obstructions, and that just as the driver had turned his horses for the purpose of driving off the track, the wagon was struck from the rear by the car. A verdict was returned against the defendant in each action, and it has appealed.

A number of errors are assigned upon the refusal of the court to give certain instructions as requested. To set out all of these requests, and the instructions actually given bear-

ing upon the same matters, would require more space than we think necessary. It is sufficient to say that we believe all proper points included in the requests for instructions were amply and fairly covered by those given. There was, therefore, no prejudice to the defendant in this particular.

It is assigned that the court erred in giving the following instruction:

"It is admitted, gentlemen, that there is an ordinance of the city of Seattle which limits the rate of speed of street cars in the business or settled residential district to twelve miles an hour. I instruct you that if you find from the evidence that this accident or collision occurred in the business or settled residential district of the city of Seattle, and that at the time of the accident the street car was going at a greater rate than twelve miles per hour, then that would constitute negligence upon the part of the defendant."

It is argued that the above instruction both declares that it was negligence *per se* to drive the car at a greater speed than twelve miles per hour, and also that the failure of the driver of the wagon to avoid the collision, if he could have done so by the exercise of ordinary care after seeing the car, would not relieve appellant of liability. The latter part of the contention we think is wholly unsustainable. It was made clear by other instructions that it was the duty of the driver to exercise ordinary and reasonable care under all the circumstances, and that in the absence of such care recovery could not be had. The declaration of the instruction, that if the speed limit established by ordinance was exceeded it constituted negligence, was a practical repetition of an instruction given in *Traver v. Spokane Street R. Co.*, 25 Wash. 225, 65 Pac. 284. It was held there that the statement in the instruction was not erroneous when taken in connection with other statements in the instructions which made it clear that the injury must have resulted from the defendant's negligence. It was also clear from the instructions in the case at bar that, before recovery could be had, the jury were required to find

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that the injuries were due to the negligence of appellant. To the doctrine that exceeding the lawful speed limit constitutes negligence this court has already subscribed in the *Traver* case. The doctrine is sustained by much authority. It is held by some courts that the fact of exceeding the lawful limit shall not be taken as negligence but as mere evidence of negligence. We prefer to adhere to the doctrine that a thing which is done in violation of positive law is in itself negligence. Appellant argues that instances might arise where the excessive speed would be justifiable. If such a case is conceivable, then the peculiar facts which would justify it would have to be presented under appropriate pleadings as a defense. No such contention is made in this case. Appellant simply contents itself with denying that it exceeded the speed limit.

Objection is made to the following instruction, which was given by the court:

"You are instructed that if you find from the evidence that the car was running at an ordinary rate of speed, that is, not exceeding twelve miles per hour, and that the bell or gong had been sounded and that the plaintiff, suddenly and without warning and under circumstances which were not reasonably to be expected, drove upon the track of the defendant in close proximity to the car of the defendant and at a time when it was not prudent to do so, then in that event the plaintiff would not be exercising ordinary care or prudence."

The above instruction was given in the exact words requested by the appellant, except that the court added the words, "that is, not exceeding twelve miles per hour." It is contended that the court erred in modifying the requested instruction, and that the effect of the instruction as given was to say to the jury that, if they found the speed limit of twelve miles per hour was exceeded, then the car was not running at an ordinary rate and the other precautions in the instructions, concerning the duty of the respondent to observe care and prudence, became immaterial. We think the ordinary mind

would not so understand the instruction when read alone, and certainly not so when read in connection with others given, which positively declared that the respondent could not recover unless he exercised that degree of care which an ordinarily prudent person would have exercised under like circumstances.

We think there was no prejudicial error, and that a new trial was properly denied. The judgment is affirmed.

FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7350. Decided August 6, 1908.]

MARY M. MILLER *et al.*, *Appellants*, v. A. G. HENDERSON
et al., *Respondents*.¹

TAXATION—ENFORCEMENT—FORECLOSURE OF GENERAL DELINQUENCY CERTIFICATE—FILING CERTIFICATE—NECESSITY. The failure to file delinquent tax certificates with the clerk of the court, prior to the commencement of a general county tax foreclosure, as required by Laws 1901, p. 385, § 3, does not deprive the court of jurisdiction, as the same is a regulation which affects no substantial right constituting due process of law; and since the proceeding is not in every sense a special statutory proceeding that needs to have been strictly followed on collateral attack.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 9, 1908, upon sustaining a demurrer to the complaint, dismissing an action for the possession of real property and to quiet title. Affirmed.

Blaine, Tucker & Hyland and *James B. Kinne*, for appellants.

Millett & Harmon and *Hayden & Langhorne*, for respondents.

FULLERTON, J.—This is an action brought by the appellants against the respondents to recover possession and

¹Reported in 96 Pac. 1052.

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quiet title to real property. The property in question is situated in Lewis county and subject to taxation therein. The taxes levied against the property for the year 1895 and prior years had been left unpaid by the then owners, and being delinquent, the county in 1901 began proceedings to foreclose the tax lien. To that end the county treasurer issued to the county certificates of delinquency on the property, and gave the notice required by statute summoning the delinquents to appear and defend the action or pay the amount due. Default having been made, judgment of foreclosure was entered on December 18, 1901. On January 31, 1902, the certificates were filed with the county clerk, and thereafter the property was sold under the judgment of foreclosure to the respondents for the amount of the taxes then due thereon.

The appellants, in their complaint, set forth the foreclosure proceedings had by the county, and averred that the judgment entered therein, and the title of the respondents based thereon, were void and of no effect, for the reason that the certificates of delinquency on which the proceedings were based were not filed with the clerk of the court at or before the time the county treasurer proceeded to foreclose the tax lien embraced in the certificates. A demurrer was interposed to the complaint, which the trial court sustained. The appellants elected to stand on the complaint, whereupon judgment of dismissal with costs was entered against them. This appeal is from the judgment so entered.

The section of the statute relied upon by the appellants to avoid the foreclosure proceedings reads as follows:

"After the expiration of five years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on said property to the county, and shall file said certificates when completed with the clerk of the court, and the treasurer shall thereupon, with such legal assistance as the county commissioners shall provide in counties having a population of thirty thousand or more, and with the assistance of the county

prosecuting attorney in counties having a population of less than thirty thousand, proceed to foreclose in the name of the county, the tax liens embraced in such certificates, and the same proceedings shall be had as when held by an individual: *Provided*, That summons may be served or notice given exclusively by publication in one general notice, describing the property as the same is described on the tax rolls. Said certificates of delinquency issued to the county may be issued in one general certificate in book form including all property, and the proceedings to foreclose the liens against said property may be brought in one action and all persons interested in any of the property involved in said proceedings may be made codefendants in said action, and if unknown may be therein named as unknown owners, and the publication of such notice shall be sufficient service thereof on all persons interested in the property described therein." Laws of 1901, p. 385, § 3.

The appellants argue that as the proceedings for the foreclosure of tax liens are special and statutory, and not according to the course of the common law, they must be construed strictly, and hence any failure on the part of the tax collectors to take the steps provided by the statute in the order in which they are therein provided must result fatally to any proceeding where the final result is to deprive a citizen of his property. Unquestionably this is in accord with the great weight of judicial authority; in fact, so uniform and so strict has been the application of the rule in most jurisdictions that the very term "tax title" has become a synonym for worthlessness. But this court has not followed this rule in all of its strictness. It has seemed to us that the levy and collection of taxes is not a special proceeding in all of its aspects. Certainly the power to do so is something more than a mere statutory right. The power lies at the very foundation of government itself. It is a power that must be exercised in one form or another else the government will cease to exist for want of means to sustain itself. Hence, we have felt that statutory provisions relating to taxation were rather regulations upon the power than the source from which the power

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is derived; and being regulations, that they were to be regarded by the court as regulations are usually regarded when the proceedings had under them are attacked collaterally; that is to say, departures from the strict rule prescribed are to be regarded as fatal only where the departure affects some substantial right of the complaining party—where he is denied some substantial right which would have been granted him had the regulation been pursued according to its terms—but to deny relief where the departure complained of does not affect the complaining party either one way or the other. In the present case the delinquency thought to be fatal is of the latter sort. This omission to file the certificate of delinquency in the office of the county clerk prior to the issuance and service of the summons could in no manner affect the rights of the appellants. Nor was the thing itself in any way necessary to constitute due process of law, as the proceeding prescribed by the statute would have been as valid and obligatory without this requirement as with it. It being therefore neither essential to the rights of the landowners nor to the legality of the statute, we think the omission of the clerk to comply with it at the time contemplated by the framers of the act did not so far deprive the court of jurisdiction as to require us to hold the sale invalid.

We conclude therefore that the judgment of the trial court is right and should be affirmed. It is so ordered.

HADLEY, C. J., CROW, and MOUNT, JJ., concur.

[No. 7303. Decided August 6, 1908.]

ISAAC BORG, *Appellant*, v. SPOKANE TOILET SUPPLY
COMPANY, *Respondent*.¹

MUNICIPAL CORPORATIONS—STREETS—COLLISION OF PEDESTRIAN AND TEAM—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pedestrian crossing a city street diagonally in the middle of the block, who was struck by a delivery wagon, is guilty of contributory negligence, precluding any recovery, where it appears that he saw the wagon approaching at six or eight miles an hour as he stepped from the curb, but paid no further heed to it, supposing it would keep on its course, there were no other vehicles on the street, and he met the wagon at right angles, while the same was crossing to the other side of the street; the jury having found that the driver of the wagon did not see the plaintiff before he was struck in time to have avoided the accident.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 17, 1907, in favor of the defendant, notwithstanding a verdict for the plaintiff, in an action for personal injuries sustained by a pedestrian through a collision with a laundry wagon. Affirmed.

Samuel R. Stern, for appellant.

Graves, Kizer & Graves, for respondent.

RUDKIN, J.—This was an action to recover damages for personal injuries resulting from a collision between the plaintiff and a laundry wagon driven by the defendant, on one of the public streets of the city of Spokane. The answer denied the negligence charged in the complaint, and alleged contributory negligence on the part of the plaintiff. At the close of the trial the court submitted the following issues to the jury, under instructions to which no exceptions were taken: (1) Negligence on the part of the defendant; (2) contributory negligence on the part of the plaintiff; and (3)

¹Reported in 96 Pac. 1037.

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conceding contributory negligence on the part of the plaintiff, did the defendant discover his peril in sufficient time to avoid injuring him, by the exercise of ordinary care. In addition to the general forms of verdict, the court of its own motion submitted the following special findings or interrogatories to the jury:

"(1) Was the plaintiff hit or knocked down by the defendant's wagon; (2) If you answer the above interrogatory in the affirmative, then state whether the driver saw the plaintiff before the wagon hit him; (3) If you answer the last interrogatory in the affirmative, then state whether the driver took sufficient time after seeing plaintiff was in danger to prevent the collision, if the driver had exercised reasonable care."

The jury returned a general verdict for the plaintiff, answered the first interrogatory in the affirmative, the second in the negative, and returned no answer to the third. The court thereafter gave judgment for the defendant, notwithstanding the verdict for the plaintiff, and from this judgment the present appeal is prosecuted.

The facts in the case are very brief, and there is little or no conflict in the testimony. On the day of the accident, an employee of the respondent was driving a laundry wagon to different points in the city of Spokane, in the pursuit of his employer's business. He drove westerly along Sprague Avenue to its intersection with Lincoln street, and turned northerly into Lincoln street along its westerly side. When he had proceeded about half way across the block between Sprague Avenue and Riverside Avenue, he turned diagonally across the street from the west side to the east side, for the purpose of delivering some laundry at a barber shop. As the respondent's wagon was passing along the west side of Lincoln street in a northerly direction, the appellant stepped from the curb on the east side of the street and started diagonally across the street to his place of business on the west side of the street. At or near the center of the street, the appellant

and the respondent's wagon or team collided while going at substantially right angles to each other, and the appellant received the injuries for which a recovery is here sought. The driver in charge of the wagon could not, or at least did not, see the appellant, because a large quantity of towels was piled up in the front part of the wagon obstructing his view. The appellant, on the other hand, saw the laundry wagon on the opposite side of the street, going in a northerly direction, when he stepped from the curb, but paid no further heed to it. He testified that he supposed that the wagon would continue on its course and would pass him long before he reached the opposite side of the street. Under these facts, there can be no question that the driver of the laundry wagon was guilty of gross and inexcusable neglect; but we see no escape from the conclusion that the appellant was equally negligent, though perhaps the consequences of his neglect were not likely to prove so serious to others. The speed of the laundry wagon did not exceed six or eight miles per hour; there were no other vehicles in the street to distract or bewilder the appellant; he was in the full possession of all his mental faculties, though apparently utterly oblivious to his surroundings. Both parties had equal rights in the street, and each rested under the same obligation to look out for his own safety and the safety of others. Had the appellant been the superior force in this instance, causing injury to the respondent or to some third person, there could be no question as to his negligence. The special findings of the jury eliminated the last clear chance doctrine from the case, and in our opinion the court below correctly ruled that contributory negligence on the part of the appellant was a complete bar to a recovery. *Barker v. Savage*, 45 N. Y. 191, 6 Am. Rep. 66; *Harris v. Commercial Ice Co.*, 153 Pa. St. 278, 25 Atl. 1133; *West v. New York Transportation Co.*, 94 N. Y. Supp. 426; *Kettle v. Turl*, 13 Misc. Rep. 156, 34 N. Y. Supp. 75; *Evans v. Adams Express Co.*, 122 Ind. 362, 23 N. E. 1039, 7 L. R. A. 678.

In view of the conclusion we have reached on the merits

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of the case, we deem it unnecessary to consider or discuss the competency or materiality of the affidavits of jurors presented in opposition to the motion for judgment. There is no error in the record, and the judgment is affirmed.

FULLERTON, CROW, and DUNBAR, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7374. Decided August 6, 1908.]

THE STATE OF WASHINGTON, *on the Relation of A. C.*
Flumerfelt et al., Respondents, v. ABRAHAM W.
ENGLE, *as State Examiner of Banks*,
Appellant.¹

BANKS AND BANKING—BRANCH BANKS—STATUTES—CONSTRUCTION. Under Laws 1907, p. 518, defining "branch banks" to mean any branch established at a city or town other than that in which the principal office is located, and defining "bank" to include foreign banks transacting banking business in this state, the term "branch banks" is not to be confined to branches of foreign banks only; but a domestic bank is authorized to establish branches, especially in view of other sections enumerating the powers of "any corporation, branch bank or foreign bank," etc.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 11, 1908, granting a writ of mandate to compel the filing of articles of a banking corporation. Affirmed.

The Attorney General and *E. C. Macdonald, Assistant* (*J. B. Alexander* and *I. B. Knickerbocker, Assistants*, of counsel), for appellant.

Graves, Kizer & Graves, for respondents.

CROW, J.—In this action an application was made to the superior court of Spokane county by A. C. Flumerfelt, H. N. Galer, and D. M. Rogers as relators, for a writ of man-

¹Reported in 96 Pac. 1045.

damus commanding Abraham W. Engle, state examiner of banks, to receive and file articles of incorporation of the British-American bank. In their affidavit the relators alleged, that they had executed articles of incorporation in quadruplicate; that they had filed one copy with the auditor of Spokane county; one copy with the secretary of state who had issued a license; that one copy was retained by the proposed corporation, and that they had tendered one copy to the defendant for filing; but that he had refused, and still refuses, to receive or file the same, for the sole reason that the proposed corporation, by its articles, assumed the power to establish branch banks, and that, under the banking laws of this state, no domestic corporation is authorized to exercise any such power. A copy of the articles set forth in the affidavit shows that the principal place of business of the corporation is to be in the city of Spokane, and also states that:

"The nature of the business of such corporation shall be to carry on a general commercial banking business, with a department for the transaction of a savings bank business, also to establish branch banks which may conduct both departments of banking business, in other cities or towns than Spokane."

To this affidavit the defendant interposed a general demurrer, which was overruled by the trial judge. Thereupon the defendant elected to stand upon his demurrer, and final judgment was entered awarding a peremptory writ of mandamus. The defendant has appealed.

The contention of appellant is, that the British-American bank, having fixed its principal place of business in the city of Spokane, has no power to establish branch banks at any other point in the state, and that he, as state examiner, is not authorized to accept or file its articles of incorporation containing an assumption of any such power. The banking act (Laws of 1907, p. 518, ch. 225) creates the office of state examiner of banks, and provides for the formation, regulation, and examination of certain banks. The appellant con-

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tends that this act is intended to be comprehensive and cover the entire subject-matter of the organization and control of incorporated banks in this state, but that it does not authorize branch banks to be conducted by domestic banks organized under its provisions. The words "branch banks" appear in §§ 6, 7, and 14. The appellant contends that these words as used must be construed as referring exclusively to branches of foreign banks, while the respondent contends that they refer to branches of domestic banks only. In § 6 we find the following definition:

"The term 'branch bank,' used in this act, shall be taken to mean a branch established in a town or city other than that in which its principal office is located."

This definition gives to the term "branch bank" a uniform meaning throughout the entire act. To consistently hold that it refers to branches of foreign banks only, we would be compelled to so construe it whenever used. This we cannot do, as its subsequent use negatives any such interpretation. If the legislature had intended to apply the term "branch banks" to branches of foreign banks only, it would have so stated in its definition. Again, the term "bank," as used and previously defined in § 6, specifically includes foreign banks transacting banking business in this state. This definition reads as follows:

"The term 'bank,' used in this act, shall be taken to mean and include every corporation, domestic or foreign (except national banks and foreign banks not authorized to receive deposits), transacting banking business in this state."

This definition of the word "bank," which includes foreign banks transacting business in this state, simplifies the meaning of the statutory definition of "branch bank," above referred to, and makes it apparent that the term "branch banks" refers to branches of domestic corporations. But even if the legislature had not enacted separate statutory definitions of the terms "bank" and "branch bank," yet, in view of other

provisions of the act, the term "branch bank" could not be construed as applying to branches of foreign banks, when used in § 14 or in any other section. Section 7 mentions the term "branch banks" three separate times in the following manner:

"Any corporation, branch bank *or foreign bank*, who shall receive money on deposit . . . every such corporation, branch bank, *or foreign bank* receiving deposits . . . existing banks, branch banks, *and foreign banks* receiving deposits."

Section 14 again refers to branch banks in substantially the same manner. A careful reading of these sections in which the term "branch banks" is used shows that any attempt to limit its use to foreign banks would deprive it of any meaning whatsoever. The statutory use of the terms "branch banks," and "foreign banks" makes it necessary to hold that the term "branch banks" can only refer to branches of domestic banking corporations, while the term "foreign banks" refers to branches in this state of foreign banking corporations. The act clearly contemplates that branches of domestic banks may be established and exist in this state.

Some questions have been raised as to the management and required capital stock of branch banks of domestic banks, if held to be authorized. We do not think any such questions are now before us, as they are not necessarily involved in the issues in this proceeding, and we shall refrain from their discussion.

The demurrer to the relator's affidavit was properly overruled. The judgment is affirmed.

FULLERTON, ROOT, and DUNBAR, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

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Opinion Per Curiam.

[No. 6361. Decided August 6, 1908.]

HANS PEDERSON, *Respondent*, v. RICHARD H. ULLRICH *et al.*,
Appellants.¹ •

APPEAL—PRESERVATION OF GROUNDS — EXCEPTIONS. One general exception to all findings of fact made or refused is insufficient to secure a review of the evidence; and in such case the statement will be struck out when no error is assigned on the exclusion of evidence, and the judgment affirmed if supported by the findings.

Appeal from a judgment of the superior court for King county, Warren, J., entered February 17, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a laborer's lien. Affirmed.

Vince H. Faben, for appellants.

William Hickman Moore and *Blaine, Tucker & Hyland*, for respondent.

PER CURIAM.—Action by Hans Pederson against Richard H. Ullrich and others to foreclose a laborer's lien on certain real estate in the city of Seattle. From a judgment and decree entered in favor of the plaintiff, the defendants have appealed.

The respondent has moved this court to strike the statement of facts, for the reason that no exceptions were taken or filed to the findings of fact. No exceptions either to findings made or to those requested and refused appear in the record. In their reply brief the appellants concede that the only mention of any exceptions being taken appears in the certificate of the trial judge to the statement of facts as follows: "That the findings of fact and conclusions of law hereto attached were the ones proposed by defendants and rejected and refused by the court and exception allowed

¹Reported in 96 Pac. 1044.

thereto." This, if conceded to be an attempt at exceptions to findings requested, will not secure a review of the evidence, as a general exception to all findings made, or all findings requested and refused, is insufficient for any such purpose. *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815; *Bringgold v. Bringgold*, 40 Wash. 123, 82 Pac. 179; *Horrell v. California etc. Ass'n*, 40 Wash. 531, 82 Pac. 889. The appellants, citing *Schlotfeldt v. Bull*, 17 Wash. 6, 48 Pac. 343; *Lilly v. Eklund*, 37 Wash. 532, 79 Pac. 1107; *Smith v. Glenn*, 40 Wash. 262, 82 Pac. 605, and *Bringgold v. Bringgold*, *supra*, contend that the statement of facts will not be stricken because of failure to except to the findings, but will be retained for the purpose of reviewing error on the part of the trial court in excluding evidence offered. Conceding this to be the correct rule, it can have no application here, as an examination of appellants' briefs fails to disclose any assignments based on alleged error of the trial court in excluding evidence. The motion to strike the statement is sustained.

The statement being stricken, the one question before us for determination is whether the findings made by the trial court sustain the judgment. Without reviewing such findings in detail, we are compelled to hold that they do.

The judgment is affirmed.

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Statement of Case.

[No. 7261. Decided August 8, 1908.]

MARY BUCKLEY, *Respondent*, v. ANDREW BUCKLEY,
Appellant.¹

PHILOMENE BUCKLEY, *Plaintiff and Appellant*, v. ANDREW
BUCKLEY, *Defendant and Appellant*.

MARRIAGE—ANNULMENT—GROUNDS—ACTIONS—FORM. Where it appears that a woman entered into a contract of marriage in good faith without knowledge that the man was incompetent by reason of having another wife, the court has power to annul the marriage without regard to the form of action commenced by her for redress.

SAME—RELIEF GRANTED—DIVISION OF PROPERTY. In an action for the annulment of a marriage entered into in good faith by the woman without knowledge that the defendant had another wife, the court has jurisdiction to dispose of the property as in the case of a divorce, under Bal. Code, § 5723, awarding the plaintiff such proportion as would be just and equitable, where she materially helped to acquire and save it (RUDKIN, J., dissenting).

DIVORCE—JURISDICTION OF COURT—DOMICILE—JUDGMENTS—OF SISTER STATE—CREDIT TO BE ACCORDED—COMITY. Where, upon service of summons by publication, a divorce is secured in a sister state, which was the domicile of the marital relation and the actual *bona fide* home of the plaintiff, the decree is entitled to recognition in every other state, under the full faith and credit clause of the constitution, or at least will be accorded credit in this state as a matter of comity.

PLEADING—DEPARTURE—DIVORCE—ANNULMENT OF MARRIAGE. It is not a material variance, that, in an action for a divorce, the plaintiff, in reply to an answer setting up the illegality of the marriage, proved the annulment of the marriage.

DIVORCE—DISPOSITION OF PROPERTY—OF PARTIES DIVORCED BY FOREIGN DECREE. Where the courts of a sister state grant a divorce to a wife domiciled there without disposing of the property of the husband situated in this state, where the husband resides, the courts of this state may thereafter, in any appropriate action, divide the property as authorized by Bal. Code, § 5723, in the case of a divorce granted here; and the wife cannot claim an absolute right to one-half thereof as between tenants in common.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 19, 1907, upon find-

¹Reported in 96 Pac. 1079.

ings in favor of the plaintiff, after a trial on the merits before the court without a jury, in consolidated actions for the annulment of a marriage and a division of property. Affirmed.

John E. Humphries and *George B. Cole*, for appellant Andrew Buckley.

McClure & McClure, for appellant Philomene Buckley.

Higgins, Hall & Halverstadt, for respondent.

Root, J.—This is an appeal from a judgment and decree rendered in two cases that were consolidated for trial, one being by the respondent against appellant Andrew Buckley for divorce or annulment of marriage and division of property, the other being by the appellant Philomene Buckley against appellant Andrew Buckley for a division of property claimed to have been acquired while he and she were husband and wife.

The material facts, as found by the court, and which we believe to be sustained by the evidence, were about these: On or about the 15th day of October, 1898, in the city of St. Paul, Minnesota, Mary Buckley and Andrew Buckley entered into an oral agreement of marriage, and then and there entered into the marriage state. The law of that state permitted common law marriages. At that time he had a former wife living from whom he had never been divorced, and she had a former husband living from whom she had not been divorced. She had reason to, and did, believe that her former husband had obtained a divorce from her prior to this time. She did not know that Andrew Buckley had a wife living, or that he had ever been married, but believed that he was unmarried and competent to enter into a contract of marriage with her.

On the 11th day of September, 1877, at Detroit, Michigan, appellant Philomene Buckley and appellant Andrew Buckley intermarried; and they lived together until about

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Opinion Per Root, J.

October 29, 1877, when he deserted her, and has never lived with nor supported her since. No justification is shown for this desertion. As a result of this marriage, a child was born in 1878. Philomene Buckley, believing that her husband Andrew Buckley had been drowned, intermarried a few years thereafter with one Young. In 1907 Philomene Buckley, having learned that her former husband, Andrew Buckley, was alive, brought an action for divorce in the superior court of Cook county, state of Illinois, the same being a court of general jurisdiction, and she at that time being, and having been for a year or more theretofore, a *bona fide* resident of said state. Her complaint was filed in said court, and summons was served by publication in the manner and form required by the statutes of the state of Illinois. Thereupon the cause was brought on for trial, Andrew Buckley not appearing, and the court entered a judgment and decree dissolving the bonds of matrimony existing between Philomene and Andrew Buckley, but declining to make any order, judgment, or decree affecting the property of these parties, or either of them, situate in the state of Washington.

As a ground for her action, Mary Buckley assigned cruelty, personal indignities, and drunkenness. These allegations were supported by the evidence adduced at the trial, and the trial court rendered a judgment and decree annulling her marriage contract with the defendant, and awarding her an undivided one-fourth interest in all of the real estate of said Andrew Buckley. The court awarded to Philomene Buckley an undivided one-fourth interest in and to all the real property belonging to Andrew Buckley.

It is the contention of Andrew Buckley that Mary Buckley never became his wife, and that the court was without authority to award her any portion of the property standing in his name or which he had acquired. Whatever may be said of the right of Mary Buckley to recover in the form of action instituted here, it cannot be doubted that she is entitled to some redress or compensation in some form of action against

Andrew Buckley. Under the law of this state, the courts are called upon to regard substance rather than form, and it is not the policy of our law to turn a suitor out of one door of the court to come in at another in order to secure justice. Where a woman in good faith enters into a marriage contract with a man, and they assume and enter into the marriage state pursuant to any ceremony or agreement recognized by the law of the place, which marriage would be legal except for the incompetency of the man, which he conceals from the woman, a status is created which will justify a court in rendering a decree of annulment of the attempted and assumed marriage contract, upon complaint of the innocent party; and where in such a case the facts are as they have been found here, where the woman helped to acquire and very materially to save the property, the court has jurisdiction as between the parties, to dispose of their property as it would do under Bal. Code, § 5723, (P. C. § 4637), in a case of granting a divorce—awarding to the innocent, injured woman such proportion of the property as, under all the circumstances, would be just and equitable.

“When either party to a marriage shall be incapable of consenting thereto, for want of legal age or a sufficient understanding, or when the consent of either party shall be obtained by force or fraud, such marriage is voidable, but only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed.” Bal. Code, § 4477 (P. C. § 6262).

“When there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage.” Bal. Code, § 5717 (P. C. § 4631).

“Any person who has been a resident of the state for one year may file his or her complaint for a divorce or decree of nullity of marriage, under oath, in the superior court of the county where he or she may reside, and like proceedings shall be had thereon as in civil cases.” Bal. Code, § 5718 (P. C. § 4632).

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In the case of *Piper v. Piper*, 46 Wash. 671, 91 Pac. 189, this court held that the rule covering the publication of summons in divorce cases applied likewise to actions for the annulment of marriage. Among other things the court said:

"Appellant argues that an action for annulment of a marriage is, in this state, of the same nature as an action for divorce, and that it has always been treated by our legislatures in the passage of statutes as in effect the same. We believe this is true. . . . It thus appears that our legislature has invariably treated actions for divorce and for the annulment of marriages as belonging to one general subject, and in conferring jurisdiction to grant divorces it has also been made to include the annulment of marriages. . . . In view of the not uncommon legislative policy above indicated, as well as in view of the express provisions of our statutes, we think it has been the evident intention of our legislature to establish the same jurisdiction and practice for both divorce and annulment suits."

In his article on Marriage, 26 Cyc. 918, 919, Mr. Justice Harlan of the United States supreme court says:

"Permanent alimony cannot be granted in cases of this kind, for if a decree is made in accordance with the prayer of the petition it must adjudge the pretended marriage void *ab initio* and consequently that the parties never sustained the relation of husband and wife. But where the woman is of good character and blameless in the affair, even though the marriage is declared void, she may be entitled to receive a substantial allowance, not technically as alimony, but by way of compensation for the pecuniary benefits derived by the man during the supposed marriage relation. . . . So, in passing the sentence of annulment, the court has power by statute in some states, and apparently at common law, to make an order for restitution to the wife of the property which the husband received from her or of which he acquired possession by virtue of the marriage. And in other cases where a party has been tricked or duped into a marriage and it is annulled, the court may order the restoration to him of his property fraudulently acquired and converted by the other party. Also where the wife entered into the marriage in good faith and is free from blame and it is annulled for the fault of the hus-

band, she may be allowed substantial compensation for the benefits which he received or the loss which she suffered in consequence of the marriage."

In the case of *Werner v. Werner*, 59 Kan. 399, 53 Pac. 127, 68 Am. St. 372, 41 L. R. A. 349, the supreme court of Kansas said:

"It is true, as the plaintiff in error contends, that the marriage between the parties was absolutely void from the beginning. Although living together as husband and wife, they were not in fact married, and hence no allowance could be made as alimony. The rule is that permanent alimony can only be allowed where the relation of husband and wife has existed; but this rule does not preclude an equitable division of the property where there is a judicial separation of the parties on account of the invalidity of the marriage contract. *Fuller v. Fuller*, 33 Kan. 582, 7 Pac. 241. Strictly speaking, this action as it was tried was not a divorce proceeding, but it was rather one to annul a void marriage. Although instituted under the statutes to obtain a divorce, the pleadings were so drawn and the issues so shaped that it was within the power of the court to grant relief independently of the statutes relating to divorce, and it rendered a decree of nullity, rather than a decree of divorce. The plaintiff below set forth at length the description and nature of the property which had been acquired by the parties, the manner in which it had been acquired, and her interest in the same, and in the prayer of her reply she asks to be allowed a just and equitable division of the same in case the marriage was held to be null and void. The court in its decree did not treat the award as alimony, but rather adjudged her a share of the property jointly accumulated by the parties during the time they lived together as husband and wife. *Fuller v. Fuller*, *supra*, greatly relied on by the plaintiff in error, holds, it is true, that in an action of this character the defendant is not entitled to recover permanent alimony, but at the same time it is expressly stated: 'That in all judicial separations of persons who have lived together as husband and wife a fair and equitable division of their property should be had; and the court in making such division should inquire into the amount that each originally owned, the amount that each party received while they were living together, and the amount of

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their joint accumulations.' Even in cases where the marriage is valid, and a divorce is refused for any cause, the court may adjudge an equitable division and disposition of the property of the parties. Civil Code, § 643. But independently of the statute of divorce, we think the court had authority to decree, not only an annulment of the marriage, but also the division of the property which had been jointly accumulated by the parties. It was an equitable proceeding and, within its equity power, the district court had full jurisdiction to give adequate relief to the parties. The division that was made was eminently equitable and just."

See, also, *Scrimshire v. Scrimshire*, 4 Eng. Eccl. 562; *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724; 2 Am. & Eng. Ency. Law (2d ed.), pp. 104, 117-8; 6 Current Law, 515; *Werner v. Werner*, *supra*; *Strode v. Strode*, 3 Bush. 227, 96 Am. Dec. 211; *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568; *Barkley v. Dumke*, 99 Tex. 150, 87 S. W. 1147; *Selby v. Selby*, 27 R. I. 172, 61 Atl. 142; *Stapleberg v. Stapleberg*, 77 Conn. 31, 58 Atl. 233; *Gore v. Gore*, 44 Misc. Rep. 323, 89 N. Y. Supp. 902; *Blankenmiester v. Blankenmiester*, 106 Mo. App. 390, 80 S. W. 706.

It is also urged by appellant Andrew Buckley that the certified copies of the decree of divorce in the case of J. T. Bell v. Mary Bell (this respondent Mary Buckley) and that of the case of Philomene Buckley v. Andrew Buckley were incompetent evidence; that the decree in each of those cases was of no effect in this state. In support of this contention reliance is placed upon the case of *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525. It appears that Bell obtained a decree of divorce against respondent Mary Buckley in the territory of Oklahoma at a time when he was living in that territory, which was at said time the "domicile" of the "marriage relation." She was absent from the territory and service was had by publication of summons. The case of Philomene Buckley v. Andrew Buckley was prosecuted in Illinois, which was and had been for many years the home of Philomene Buckley; she having removed to that state from Mich-

igan after her desertion by appellant Andrew Buckley. Summons was published in this case. Neither personal service upon nor appearance by defendant in either case.

In the *Haddock* case the supreme court stated several legal propositions as having been "irrevocably concluded by previous decisions" of that court, and which were accepted as a basis for the arguments put forth to sustain the conclusion announced in the case then at bar. One of these propositions was stated as follows:

"The place where the wife was domiciled when so abandoned constitutes her legal domicile until a new actual domicile is by her elsewhere acquired."

This would clearly imply that she could acquire an actual domicile elsewhere than in the state where their domicile was at the time of her abandonment. The following proposition was also announced:

"So also it is settled that where the domicile of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause."

Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, is cited in support of this proposition. It was also stated that, where the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state does not become a new domicile of matrimony, and is not to be treated as the actual or constructive domicile of the wife. In the *Haddock* case the marriage took place in New York and the husband removed to Connecticut, where he secured a divorce by publication without

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personal service upon the defendant, who remained a resident of the state of New York. She subsequently prosecuted an action in her home state, to which action he interposed in defense the judgment of the Connecticut court. The substance of the decision of the United States supreme court was, as we understand it, that the courts of New York were not compelled by virtue of the full faith and credit clause of the Federal constitution to recognize the decree of the Connecticut court, although as a matter of comity they might so do. In that case it was also announced that the principles applying to a judgment *in personam* did not relate to proceedings *in rem*, the court using this language:

"That is to say, in consequence of the authority which government possesses over things within its border there is jurisdiction in a court of a state by a proceeding *in rem*, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing."

Discussing a suit for divorce as a proceeding *in rem*, the court propounds the question as to what constitutes the *res*, and says that, if the marriage relation constitutes this, it cannot be supposed that it was removed from New York to Connecticut when the husband wrongfully abandoned the wife and went from the state of New York into Connecticut; and that anyhow, if he could take a portion of the *res*, the other portion would remain with the wife where the marriage took place and where her domicile legally remained. The court says:

"On the other hand, the denial of the power to enforce in another state a decree of divorce rendered against a person who was not subject to the jurisdiction of the state in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the states over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy but also to protect the

individual rights of their citizens. It does not deprive a state of the power to render a decree of divorce susceptible of being enforced within its borders as to persons within the jurisdiction, and does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. . . . It enables the states rendering such decrees to take into view for the purpose of the exercise of their authority the existence of a matrimonial domicile from which the presence of a party not physically present within the borders of a state may be constructively found to exist."

Under this holding it would seem that, Philomene Buckley having obtained a decree of divorce pursuant to the laws of the state of Illinois in the courts of that state, which at that time was, and for several years theretofore had been, her actual *bona fide* home and which was the "domicile" of the marital relation, such decree was not only valid in that state, but entitled to recognition in every other under the full faith and credit clause of the constitution. If, however, this be not the meaning of the language used by that court, then we think there is no question but that, as a matter of comity, the courts of this state may recognize the decree rendered by the court of Illinois. The same observations may be made regarding the decree of the Oklahoma court in the case of *J. T. Bell v. Mary Bell*, now *Mary Buckley*. We, therefore, hold that the trial court was not in error in admitting in evidence the divorce decrees referred to.

It is further contended by appellant Andrew Buckley that, inasmuch as *Mary Buckley's* complaint herein was one as in an action for divorce, while in her reply to appellant's answer she prayed for a decree of annulment of marriage, the latter prayer being granted by the court, there was such a variance as should prevent her from having any relief in this action. We do not think this contention is meritorious. 25 Cyc. 900; *Werner v. Werner, supra*.

It is contended by the appellant Philomene Buckley that, after the decree of divorce was rendered in her suit against

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Andrew Buckley in Illinois, she and Andrew Buckley became tenants in common as to all of the property which he had accumulated and which was situated in the state of Washington; that each became the owner of an undivided one-half interest therein, and that she is entitled in this action to have the court set aside to her one-half of all of such property. We think that where a court of a sister state grants a decree of divorce to a wife residing in that state and makes no disposition of the property belonging to the parties and situated in our state where the husband resides, the courts of this state may thereafter, in a timely suit for partition, or in any other appropriate action, divide the property in this state between the parties as it would do under Bal. Code, § 5723 (P. C. § 4637) in a divorce proceeding. *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931; *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864; *Fields v. Fields*, 2 Wash. 441, 27 Pac. 267; *Cook v. Cook*, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706; 1 Ency. Plead. & Prac., 415. In this action we think the trial court was authorized to divide the property of Andrew Buckley and Philomene Buckley between them in such a manner as it deemed just and equitable under all the circumstances of the case, and that it was not obliged to divide the property equally or in any definite proportions other than would be thus equitable and just. The value of the property was not found by the trial court. The total value was probably \$5,000 or \$6,000. Bearing in mind that appellant Buckley accumulated this property, and that he is now sixty-six years old, in feeble health, requiring support, medical attendance, and nursing, we cannot say that the disposition of the property, as made by the trial court, was erroneous, inequitable, or unjust.

Finding no error in the record, and believing that substantial justice has been done as between all these parties, the judgment and decree is affirmed.

HADLEY, C. J., and CROW, J., concur.

FULLERTON, J., concurs in the result.

RUDKIN, J. (concurring)—I concur in the judgment of affirmance but not in the application of Bal. Code, § 5723 (P. C. § 4637), to the annulment proceedings of Mary Buckley against Andrew Buckley. Between these parties there was no marriage, and their property should be divided or distributed according to the rules governing the division or distribution of the joint accumulations of any other persons between whom no marriage exists. As applicable to such a proceeding, I approve the rule announced in the authorities cited in the majority opinion; viz., that the court may restore to the woman any property the man may have acquired by or through her, may compensate the woman for any pecuniary benefits derived by the man during the existence of such relation, or may make a just and equitable distribution of their joint accumulations. But this is very different from the power exercised by the court under § 5723. Under that section the court considers not only the party through whom the property was acquired, but also the merits of the parties and the condition they will be left in by the divorce. It not only considers the past but provides for the future as well. It may, and generally does, provide for the future maintenance and support of the wife, by general alimony or by an award of property, especially where the husband is at fault. None of these considerations enter into a decree of nullity. In the one case the property is simply distributed to those who have aided and assisted in its acquisition. In the other case the court exercises a broader discretion, distributes the property according to different rules, and adjusts the rights, duties, and obligations growing out of the marriage relation. It seems to me that even a superficial reading of this section would convince one that a valid subsisting marriage lies at its very foundation. I believe, however, that the division made by the lower court was equitable and just under all the circumstances, without any regard whatever to § 5723, and that its judgment should be affirmed.

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Opinion Per HADLEY, C. J.

[No. 7209. Decided August 8, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE L.
WAINWRIGHT, *Appellant*.¹

EXTORTION—EVIDENCE—SUFFICIENCY—CRIMINAL LAW—FAILURE OF PROOF—ARREST OF JUDGMENT. Upon a trial and conviction of a coroner upon a charge of extortion in having exacted \$100^a as a fee for services in connection with an inquest upon one McG., in violation of a statute against the exaction or extortion by an officer of "any greater fees for services than by law stated and allowed," there is a total failure of proof, and motion in arrest of judgment should have been granted, where it appears that the defendant rendered no services and was not entitled to any fees whatever for services in connection with an inquest, and there was no legal obligation on the part of the prosecuting witness to pay any fee in the matter.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered June 17, 1907, upon a trial and conviction of the crime of extortion. Reversed.

Dave Hammack and Smith & Brawley, for appellant.

M. P. Hurd, for respondent.

HADLEY, C. J.—The appellant was prosecuted and convicted in this action for the crime of extortion. The body of the information upon which the prosecution was based reads as follows:

"George L. Wainwright is accused by M. P. Hurd as prosecuting attorney of Skagit county, state of Washington, of the crime of extortion, committed as follows: He the said George L. Wainwright, in the county of Skagit, state of Washington, on, upon, or about the 18th day of February, 1907, then and there being the duly elected, qualified, and acting coroner of Skagit county, Washington, and whose fees are stated by law, did unlawfully, corruptly, extorsively, and by color of his said office, extort, levy, demand of and from one Sam Exktrom the sum of one hundred dollars (\$100), lawful money of the United States of America, and of which sum he, the said George L. Wainwright, did then

¹Reported in 97 Pac. 51.

and there unlawfully, corruptly, extorsively and by color of his said office, extort, levy, demand and receive of and from the said Sam Exktrom the sum of eighty dollars (\$80) lawful money of the United States of America, and then and there unlawfully, corruptly, extorsively and by color of his said office, did extort, levy and demand a promise of the said Sam Exktrom the balance of said sum of one hundred dollars (\$100) to wit: the additional sum of twenty dollars (\$20), lawful money of the United States of America, to be paid forthwith to one Jasper Hollman for him the said George L. Wainwright, as coroner aforesaid, and which said sum of twenty dollars (\$20), on, upon or about the said 18th day of February, 1907, was paid by the said Sam Exktrom to the said Jasper Hollman for the said George L. Wainwright, as coroner aforesaid, and all of which said sums of money aforesaid were then and there, as aforesaid, extorted, levied, demanded and received by the said George L. Wainwright, as such coroner of and from the said Sam Exktrom, as and for a fee for services in his the said George L. Wainwright's official capacity as county coroner aforesaid in connection with an inquest upon one McGovern and which said sums of money aforesaid so extorted, claimed and received for fees, were greater than is stated and allowed by law; contrary to the law in such cases made and provided and against the peace and dignity of the people of the state of Washington."

The statute invoked in behalf of the prosecution is found in Bal. Code, § 7218 (P. C. § 1730) and is as follows:

"If any officer, whose fees are stated by law, shall corruptly exact or extort any greater fees for any services than by law are stated and allowed, or shall levy, demand, receive, or take under color of his office any bond, bill, or note, or other assurance or promise whatever, securing the payment of a greater sum of money for any service than he is by law authorized to demand or receive, he shall, on conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding one thousand dollars."

It will be observed that, briefly stated, the statute defines the crime as the corrupt exaction of greater fees for official services than are allowed by law, or the taking under color

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of office of a promise securing the payment of fees in excess of those stated by law. The information in this case makes averments which extend to both phases of the statute; that is to say, the charge is made that \$80 was actually exacted and received by appellant, and also that he exacted a promise for the payment of \$20 more. The statute refers to "greater fees for any services," which can only mean for *some* services actually rendered by the officer in the line of his official duties. The information charges that the exaction was made as a fee for services of appellant in his official capacity as county coroner in connection with an inquest upon one McGovern. The proofs, however, do not sustain the information. The appellant held no inquest whatever upon the body of said McGovern. There is no dispute about this. The claim as made in the testimony of the state is that appellant suggested to one Exktrom, who is mentioned in the information, that if an inquest should be held the result might involve Exktrom as in some way connected with the cause of McGovern's death. Exktrom claims that appellant proposed to him that, if he would pay to appellant \$100 as the county's expenses in the matter, no inquest would be held; that Exktrom at once procured and paid to appellant \$80 in cash and promised to procure and deliver to another for appellant \$20 more. Appellant denies that he ever made such a proposition, and denies that he received \$80 cash or any other sum from Exktrom, but says he decided not to hold an inquest, and thereupon Exktrom, who said he was a friend of the deceased, volunteered to say that he would raise and pay \$20 so that the county would be at no expense in the matter.

Concerning the relative weight of this testimony, we have nothing to do, as that was for the jury if the cause should have gone to the jury. But we have stated the respective theories advanced in the evidence of both the state and the accused in order that it may be seen that the appellant rendered no actual services for which he could charge even legal fees, and that Exktrom was under no legal obligation in the

premises to pay any sum as fees. Without the right existing upon the one hand to demand legal fees for services actually rendered, and without the obligation of Exktrom upon the other hand to pay lawful fees, there could have been no extortion of "greater fees," for clearly the statute contemplates an exaction of an excessive amount when the right exists to demand *some* amount within lawful provisions because of actual services rendered. In other words, the exaction must be for real or pretended official services demanded of one who at least believes himself to be under legal obligations to pay something, and not for merely declining to discharge an official service, the demand being made of one who is not, and who knows he is not, under legal obligations to pay any amount.

"Consequently the evidence must show that the fees were for real or pretended official services, and that they were demanded from some one from whom the officer had a right to demand them." 5 Ency. of Evidence, p. 719.

See, also, *Collier v. State*, 55 Ala. 125; *Runnells v. Fletcher*, 15 Mass. 525; *Shattuck v. Woods*, 1 Pick. 171; *Hays v. Stewart*, 8 Tex. 358; *Ferkel v. People*, 16 Ill. App. 310. Motion in arrest of judgment was made by appellant, on the ground that the evidence was not sufficient to sustain the charge. The motion was denied. For the foregoing reasons, we think the denial of the motion was erroneous.

The judgment is therefore reversed, and the cause remanded with instructions to vacate the judgment, to grant the motion in arrest of judgment, and to dismiss the action.

FULLERTON, MOUNT, and RUDKIN, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 7204. Decided August 14, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. JACOB KNAPF,
Appellant.¹

OBSTRUCTING JUSTICE. An information for resisting an officer in serving or attempting to execute any legal writ, rule, order or process as defined by Bal. Code, § 7208, is defective where it simply charges unlawfully resisting an officer in the levying of an execution issued by a justice of the peace on a certain judgment; but the same must aver that the process was a "legal" process in the language of the statute, or set out its terms so as to show the essentials of a legal process.

SAME—EVIDENCE—ADMISSIBILITY—LEGALITY OF PROCESS—KNOWLEDGE OF OFFICER. In a prosecution for resisting an officer in the levying of an execution which was fair on its face, it is error to exclude evidence of an infirmity in the judgment and that the officer had notice thereof; since an officer is not protected by a writ fair on its face unless he acted in good faith, and would be a trespasser if he had notice of the invalidity of the writ.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered October 26, 1907, upon a trial and conviction of the crime of resisting an officer. Reversed.

Pruyn & Felkner, for appellant.

C. R. Hovey and *H. W. Hale*, for respondent.

FULLERTON, J.—The appellant was informed against for the crime of resisting an officer, the charging part of the information being as follows:

"The said Jacob Knapf did in the County of Kittitas and State of Washington, on the thirtieth day of May, one thousand nine hundred and seven, knowingly, wilfully and unlawfully resist and oppose A. W. Byars, deputy sheriff of Kittitas county, Washington, in the levying of an execution issued by S. E. Willis, justice of the peace for Cle Elum precinct, Kittitas county, Washington, on a judgment rendered and entered by said justice in a certain cause brought before

¹Reported in 96 Pac. 1076.

him, wherein Frank Morgan was plaintiff and Jacob Knapf and Bertha Knapf were defendants, by then and there striking and resisting the said A. W. Byars and attempting by force to prevent said A. W. Byars from making said levy, and by also striking and resisting Thomas Johnson, constable for said precinct, who had been authorized and directed by said A. W. Byars to assist him in levying said writ."

After arraignment, he demurred to the information on the ground that it did not state facts sufficient to constitute a crime. The demurrer was overruled, whereupon he pleaded not guilty, and a trial was had before a jury, which resulted in a verdict of guilty as charged in the information. From the judgment pronounced thereon, he appeals.

The first assignment is that the court erred in overruling the demurrer. The statute upon which the prosecution was founded is in the following language:

"If any person knowingly and wilfully resist or oppose any officer of this state, or any other person authorized by law, in serving or attempting to execute any legal writ, rule, order, or process whatsoever, or shall knowingly and wilfully resist any such officer in the discharge of his duties without such writ, rule, order, or process, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars nor less than fifty dollars, or by both fine and imprisonment, at the discretion of the court." Bal. Code, § 7208 (P. C. § 1721).

The statute, it will be observed, makes it an offense to knowingly and wilfully resist or oppose an officer who is serving or attempting to serve a legal process; hence, the information, to be sufficient under the statute, must adopt the language of the statute and aver that the process was a "legal" process, or it must set out in terms, or describe it in such a manner that the court can see that none of the essentials of a legal process are wanting. *State v. Flagg*, 50 N. H. 321. The information is lacking in these particulars. It does not aver that the writ the officer was in the act of serving when the offense was committed was a legal writ, nor does it describe it in such a manner as to show it to be a legal writ.

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The rule announced in the case of *State v. Brown*, 6 Wash 609, 84 Pac. 133, does not sustain this information. In that case there was an averment of the legality of the process held by the officer, not in the words of the statute, it is true, but in words which the court held to be equivalent to the words of the statute. In the information before us there is no allegation of any kind to the effect that the process in the hands of the officer was a legal process. It follows, therefore, that the court erred in refusing to sustain the demurrer.

The second assignment of error we think is well taken also. The court held on the trial that the officer was protected by a writ fair upon its face, and refused to permit the defendant to show an infirmity in the judgment on which the writ was founded, and that the officer serving the writ had knowledge of that infirmity. But the rule is not so narrow as this. While by the term "legal process" is meant a process fair on its face, and the state in order to make a case need not show that the writ had behind it a valid and legal judgment, yet the officer must act in good faith. He may rely upon a writ fair upon its face to protect him as long as he is without actual knowledge of its invalidity. But if he has such actual knowledge, he becomes a trespasser in executing it. So here the appellant should have been permitted to show, if he could, that the judgment on which the writ was executed was void from the beginning, or had been superseded, and that the officer had actual knowledge of the conditions. 1 Freeman, Execution (3d ed.), §§ 101, 102.

The judgment appealed from is reversed and remanded with instructions to sustain the demurrer.

HADLEY, C. J., MOUNT, and RUDKIN, JJ., concur.

[No. 7231. Decided August 14, 1908.]

ELLA CAVANESS *et al.*, *Appellants*, v. MORGAN LUMBER
COMPANY, *Respondent*.¹

MASTER AND SERVANT—NEGLIGENCE—SAFE APPLIANCE—EVIDENCE—SUFFICIENCY. In an action for the death of a fireman on a logging engine, who jumped when the train ran away on a steep grade, there is no sufficient evidence of negligence on the part of defendant, and a nonsuit is properly granted, although there was evidence tending to show that the rails were light, not entirely even and somewhat worn when put down, that while the cars were of standard make, the brakes could not be set while the train was in motion, that the brake blocks were worn, and the engine lighter than some engines, where there was no evidence that the defects rendered the appliances unsafe, but use for a year had demonstrated their safety; since it is not negligence to fail to use the best possible equipment.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered October 1, 1907, in favor of the defendant, upon granting a nonsuit at the close of plaintiffs' evidence, in an action for damages for the death of a fireman employed on a logging train. Affirmed.

Ellis, Fletcher & Evans, for appellants.

William P. Reynolds, for respondent.

FULLERTON, J.—W. M. Cavaness was killed while in the employ of the respondent as a locomotive fireman, and this action was brought on behalf of his widow and minor children to recover damages for his death. The plaintiffs were nonsuited at the conclusion of their evidence, and appeal from the judgment entered. The respondent is engaged in the business of manufacturing lumber at the town of Lester, in this state. As a part of its equipment, it owns and operates a logging road which extends from its mill back into the hills to certain timber tracts, the particular branch of the road in question having a length of some two miles. Cavaness

¹Reported in 96 Pac. 1084.

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had been in the employ of the respondent company for about three years prior to his death; his work theretofore, however, had been principally in the mill proper, although he had worked in the woods at different times. On the day of his death he was firing the logging engine. In the afternoon of that day, on a homeward trip with a load of logs, the train got out from the control of the engineer, and the train crew, fearing the train would leave the track from excessive speed, jumped therefrom. The engineer and brakeman got off safely, but the fireman was instantly killed.

The allegations of negligence relied upon for a recovery were, that the road over which the train was operated was built very light, with small, uneven, irregular rails, and in an uneven and irregular manner; that the cars had brakes on one end only, and that these could not be operated while the train was in motion, but must be set before the cars were started, and that the brakes were old, worn, broken, and much out of repair, and of little or no benefit for holding the cars when set as tight as they could be set; that the engine used was too light and inadequate for the work required of it, owing to the steep grade; and that the appliances generally were insufficient, defective, and inadequate for safe operation on the grade in question. There was no allegation that the train was overloaded at the time of the accident, nor was it alleged that any mismanagement or other negligence on the part of the train crew caused the accident, the allegation of negligence being confined entirely to the defective condition of the equipment.

The evidence tended to show that the grade of the track for some distance from the mill towards the timber was comparatively level, but increased rapidly as the timber was approached, the grade reaching in some places as high as 5 and 7 per cent. The road was laid with light rails not of a uniform size, and did not present an entirely even surface, being, as the witness expressed it, "A little bit waving." Nor were the rails new when laid down, but were worn by use else-

where, presenting a surface more round than flat. The cars were ordinary logging trucks covered with a platform. One of them had brakes at one end only. The brake levers did not extend above the top of the car platform, and were operated by means of a brake-staff, which was inserted into the socket in the lever or drum around which the chains were wound, which connected with the brake beams. These could be reached from the ends of the cars only, and could not be operated at all while the train was in motion. One of the sprocket wheels holding the drum had two or three of its sprockets broken, and the others somewhat worn. The brake blocks also were worn on all of the brakes, in some instances down to about half of their original thickness. The engine was of standard make and weighed twenty tons.

It was further shown that the train had made four trips on the day of the accident prior to the one on which it was allowed to run away. Three of these trips carried down two loaded cars, and on the other, two loaded cars and an empty on which the men working in the woods rode to the mill. Two cars were all that were carried when the train got from under the control of the engineer. Whether on that trip anything more than the ordinary load was carried is not shown, but it did appear that a rain storm came on while the cars were being loaded, and that the track was wet when the train started. The witnesses testify that the brakes were set in the usual manner before starting. The engineer felt the train getting from under his control immediately after it started. After vainly endeavoring to control it he reversed the drivers, and turning to Cavaness said to him, "I guess it is a case of having to jump." Cavaness replied that he would not jump until he had seen the engineer jump. The engineer thereupon jumped off, and Cavaness followed. The train ran down until it reached the more level track, when it stopped unharmed, still carrying its load of logs.

On the foregoing facts, the trial judge held that the appellants had shown no cause for recovery, and it seems to us that

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its judgment must be affirmed. It was not shown that any of the defects pointed out in the equipment of the road rendered it unsafe for the purposes for which it was intended. True, it was shown that it did not have the best possible equipment, but no rule of law requires it to have such in order to avoid liability to a servant injured thereon. Reasonably safe appliances are all that is required. It is not negligence *per se* to use a railroad rail on a logging road smaller than the size used on transcontinental tracks, nor is it negligence *per se* to use those that are worn, nor those of different sizes. Nor is it negligence *per se* to use cars of standard make, although the brakes may not come above the top of the car and must be set or loosed while the cars are at a standstill. Nor must the brake blocks be kept new all the time. The real question in every case is, are those that are in use reasonably safe? In the case at bar there is no evidence that the defects complained of rendered the appliances unsafe for the uses for which they were intended. On the other hand, the contrary is proved by the most satisfactory of all evidence, actual demonstration by use for over a year. The argument that the engine was too light for this grade could be made against any engine the company might procure. A light engine cannot of course take down so large a load as a heavier one, but in the range of its capacity it is just as safe as a heavier one. The immediate cause of the runaway is only a matter for conjecture, but it was probably caused by loading too heavy for the wet track. But this is not charged as negligence in the complaint, and could not in this action be a ground for recovery, even had it been shown that the loading had been done by persons rendering the respondent responsible to the fireman for injuries resulting therefrom.

As we find no error in the record, the judgment will stand affirmed.

HADLEY, C. J., CROW, and ROOT, JJ., concur.

[No. 7251. Decided August 14, 1908.]

FENTON H. GOSS, *Appellant*, v. NORTHERN PACIFIC
HOSPITAL ASSOCIATION OF TACOMA, *Respondent*.¹

CONTRACTS—CONSTRUCTION—SUBSEQUENTLY REDUCING TO WRITING—EFFECT. The fact that a contract for the construction of a building was not reduced to writing and signed until after the commencement of the work does not affect the writing as a controlling statement of the terms and conditions agreed upon, and the writing measures the rights of the parties.

SAME—BUILDING CONTRACTS—STIPULATIONS—REMEDY PROVIDED—EXCLUSIVENESS. Where a building contract provided for its completion by the principal contractor within a certain date, and that, for any delay or default of any other contractor, additional time should be given for the completion of the building, the provision constitutes the principal contractor's sole remedy; and he cannot recover damages from the owner resulting by reason of the delay or default of another contractor having the plumbing work.

Appeal by plaintiff from a judgment of the superior court for Pierce county, Clifford, J., entered July 10, 1907, upon the verdict of a jury rendered in favor of the plaintiff, after the withdrawal of certain issues at the instance of the defendant, in an action on contract. Affirmed.

Herbert S. Griggs and *Walter M. Harvey*, for appellant.
B. S. Grosscup, for respondent.

FULLERTON, J.—In June, 1904, the respondent asked for bids for the construction of a hospital and staff cottage building, on certain lots which it owned in Tacoma, Washington, according to plans and specifications which had been theretofore prepared by its architects. The appellant submitted a bid for the work, which proved to be the lowest, and was requested to visit the architects with a view to entering into a contract. The architects had their offices at St. Paul, Minnesota, and it was at that place the consultation was

¹Reported in 96 Pac. 1078.

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held. At that time certain changes in the specifications with regard to the material to be used were made, and it was also agreed that the furnishing and installation of the plumbing and the heating plant should be let as a separate contract. The remaining work was thereupon let to the appellant.

The appellant returned home and entered on the performance of the contract about the first of July, 1904. The contract was reduced to writing and signed by the parties a month or six weeks later. As written the contract provided for the completion of the building by March 1, 1905, and contained the following clause:

"Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the owner or the architects, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no default of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the architects, within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the architects, but appeal from their decision may be made to arbitration as provided in Article III of this contract."

The contract for the plumbing and the installation of the heating plant was let to the Dwyer Steam Heating Company of St. Paul, by the respondent, as an independent contract. The terms of this contract are not shown in the record, and it does not appear whether there was any breach of the contract on the part of the company or not, but it did not put in the plumbing nor install the heating plant at the time the building was ready to receive them, thereby delaying the appellant in the performance of his part of the contract, to his damage, as he claims, in a large sum of money. The appellant also was required by the architect in charge to do some

work not called for in his contract, and certain deductions were made for materials which the architect claimed to be defective and not in accordance with the contract.

This action was begun by the appellant to recover for these several items. At the trial it was stipulated that the jury might return a given sum for extra work, and the court submitted to them the question whether the deductions were properly made. The question of damages, however, it withdrew from the consideration of the jury, holding that damages for delay caused by an independent contractor were not recoverable against the owner. This appeal questions the correctness of the latter ruling. The appellant seems to think that the question is affected somewhat by the fact that the contract was not reduced to writing and signed by the parties until after the appellant had entered upon the performance of the work. But manifestly the rights of the parties are not affected by this circumstance. Whether the contract was at first oral and was afterwards reduced to writing by the parties by mutual consent for their mutual protection, or whether it was understood at the time the contract was entered into that it should be afterwards reduced to writing, the writing equally measures the rights of the parties. Its efficacy as a contract and as the controlling statement of the terms and conditions of the agreement between the parties is not affected by the fact that it was not written until after these terms and conditions were orally agreed upon, or by the fact that the appellant began work before it was written.

The trial judge ruled as he did on the principal question because of the clause in the contract above quoted. He held that since the parties had contracted that for any delay caused the appellant by the "act, neglect, delay or default . . . of any other contractor," additional time should be given him for the completion of the work, that this marked the extent of appellant's remedy for such act or default.

It seems to us that this conclusion is sound. For conditions which arise in the execution of a contract and for which the

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contract itself makes no provision, the courts are at liberty to apply the ordinary legal remedies when these conditions become a subject of controversy between the contractors; but where the probability of the happening of the condition has been foreseen and a remedy is provided for its happening, the presumption is that the parties intended the prescribed remedy as the sole remedy for the condition, and this presumption is controlling where there is nothing in the contract itself or in the conditions surrounding its execution that necessitates a different conclusion. So in this case, since the parties foresaw that the appellant might be delayed in the execution of his part of the work by the failure of the party having the contract for the plumbing and heating plant to perform its work on time, and provided in the contract that the remedy therefor should be an extension of time on his part to perform the work, the presumption arises that this was intended to measure the rights of the contractor thereunder. Is there anything in the contract itself, or in the circumstances surrounding it, that precludes the idea that it was so intended? We see nothing that works against the conclusiveness of the presumption. The contract was an ordinary building contract, in which the parties undertook to put in writing all of their rights and liabilities thereunder. It provided for every condition that could arise in its execution, leaving nothing to surmise or inference, and we think it must be held to contain the entire agreement.

This question was passed upon in the case *Haydnville Min. & Mfg. Co. v. Art Institute*, 39 Fed. 484, where the rule was announced in accordance with the conclusion we have reached, and in the cases of *Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333, and in *Genovese v. Third Ave. R. Co.*, 13 App. Div. 412, 43 N. Y. Supp. 8, where a contrary conclusion was announced. For the reason stated, however, we feel constrained to follow the doctrine of the Federal case.

The judgment is affirmed.

HADLEY, C. J., CROW, and ROOT, JJ., concur.

[No. 7347. Decided August 14, 1908.]

THOMAS R. SMITH, *Respondent*, v. EDWIN J. BROWN,
Appellant.¹

PARTNERSHIP—RECEIVERS—APPOINTMENT—SHOWING—SUFFICIENCY. The appointment of a receiver in a suit between alleged partners in the publication of a book, upon the allegation that defendant denies the partnership and refuses to recognize the plaintiff or to account to him, is not warranted where it is not shown that the defendant was insolvent, and it appears that the book is not yet completed and cannot be without additional funds, that the partnership is without funds, and that the receivership would only result in failing to complete the book and realizing anything on the venture; since clear necessity must be shown for the appointment.

Appeal from an order of the superior court for King county, Yakey, J., entered November 6, 1907, appointing a receiver. Reversed.

John R. Parker, for appellant.

PER CURIAM.—The appellant and respondent, together with Ethol Hine Morse and Gertrude J. Desch, entered into a partnership agreement to compile, publish and sell to certain selected patrons a book to be known as the Society Blue Book of Seattle. By the terms of the writings, the appellant Brown agreed to finance the concern to the amount of \$1,000; the respondent Smith agreed to present the scheme to certain selected persons of high social standing and solicit their orders for the book, and take contracts for the appearance of their names in the book, together with such insignia of social standing as might be appropriate; Ethol Hine Morse agreed to take charge of all matters of art pertaining to the production of the book, and of the illustrations and artistic embellishments of the same, and to act as general business manager of the partnership; and Gertrude J. Desch agreed to perform,

¹Reported in 96 Pac. 1077.

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and cause to be performed, the duties of literary editor of the book. The profits, if any, of the enterprise were to be divided share and share alike. The appellant advanced to the partnership the sum agreed, and the compilation of the book and the solicitation of orders was entered upon. One month later, the respondent and Ethol Hine Morse and Gertrude J. Desch made an assignment in writing of all their interests in the partnership to John R. Parker, an attorney of Seattle.

The purpose of this transfer is a subject of dispute between the parties. The appellant claims that it terminated the partnership and that subsequent thereto he had the sole interest in the enterprise, and that the respondent's connection thereafter with the business was as his employee; while the respondent says that it marked the termination of the interests of two of the parties only, and that he continued thereafter as an equal partner with the appellant. Later on, as the work progressed and was nearing completion, the appellant took the business into his own hands, and refused to recognize the respondent as having any connection therewith or interest therein. The respondent thereupon began this action, asking for an accounting with the appellant and for the appointment of a receiver to take charge of the affairs of the concern pending the determination of his rights therein. The court, on an *ex parte* application, appointed a temporary receiver, making the receivership permanent on a hearing after notice to the appellant. This appeal is from the order appointing the receiver.

There is no appearance in this court for the respondent, and we are not made acquainted with the reasons which actuated the court in the appointment of a receiver; but as we view the record, there would not only seem to be no necessity for the receivership, but that it will work a positive injury to the enterprise, practically rendering it impossible of completion. There is no showing that the appellant is insolvent or financially embarrassed, or that he is not abundantly able to respond to any judgment the respondent should obtain

against him, nor is it shown that the receiver will in any way aid in determining the amount due the respondent should it be ascertained that he is entitled to share in the enterprise. On the other hand, it does appear that the book is not yet completed, and that the partnership is without funds and will require additional funds before anything can be realized out of the enterprise. Unless some charitable person comes to its relief, therefore, it would seem that the enterprise must die in the receiver's hands for want of means to complete it. The appointment of a receiver is the exercise of an extraordinary remedy, and a clear necessity therefor should be made to appear before the jurisdiction is exercised. *Ridpath v. Sans Poil & Columbia R. Ferry Transp. Co.*, 26 Wash. 427, 67 Pac. 229. No such necessity was shown in the case before us.

The order appealed from is reversed, and the cause remanded with instructions to discharge the receiver.

[No. 7297. Decided August 17, 1908.]

R. E. SHEPARD, *Respondent*, v. MINNEAPOLIS THRESHING
MACHINE COMPANY, *Appellant*.¹

EVIDENCE—SELF-SERVING DECLARATIONS—RES GESTAE. In an action by an agent for salary and expenses incurred in a European trip, a report of his trip, made upon his return at the home office, at the defendant's request, reviewed and accepted at the time by the defendant, is not inadmissible because containing self-serving declarations argumentatively pointing out the necessities of certain expenditures, but may be received as an incident between the parties contemporaneous with the trip in the nature of *res gestae* of the whole transaction.

APPEAL—REVIEW—VERDICTS. A verdict upon conflicting evidence will not be set aside if there is sufficient competent evidence to sustain it.

¹Reported in 97 Pac. 57.

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Opinion Per HADLEY, C. J.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 19, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a contract of employment. Affirmed.

J. D. Campbell and *J. B. Campbell*, for appellant.

John L. Dirks, for respondent.

HADLEY, C. J.—This is a suit for the recovery of money claimed by the plaintiff from the defendant on account of unpaid salary and for advancements made for defendant's benefit. The defendant is engaged in the manufacture and sale of threshing machines, with its factory and principal office at Minneapolis, Minnesota, and with branch offices in different parts of the United States. A branch office is maintained in Spokane, in this state, and the plaintiff was employed under written contract as manager thereof, from January 1, 1904, to January 1, 1906, at the agreed salary of \$125 per month and traveling expenses. In December, 1905, before the aforesaid contract expired, the defendant wrote the plaintiff at Spokane that it was not satisfied with the results of the Spokane branch, and suggested the alternative that the plaintiff should either remain at Spokane under a new arrangement or take other territory for defendant. Matters stood thus until some time in January, 1906, when the defendant wrote to plaintiff and asked him to take a trip to Turkey in behalf of the defendant, for the purpose of setting up and starting some machines which the company expected to ship to a customer in Constantinople. After some correspondence, this arrangement was carried out, and plaintiff made the trip to Europe and return.

It is the plaintiff's claim that it was orally agreed that he should receive a salary during the time of his European trip at the rate of \$2,500 per year and necessary expenses, but the defendant alleges that no change was made in the amount of salary theretofore paid, and that the rate of \$125 per

month still continued even during the foreign trip. This suit, in its first cause of action, is to recover the balance of the larger salary claimed by plaintiff during the time covered by the trip abroad. The second cause of action is for the amount of certain expense items of the trip which are in dispute between the parties. A third cause of action is also stated for the salary of plaintiff at the rate of \$125 per month from September 1, 1906, when plaintiff returned from Europe, until January 1, 1907, during which time he says he held himself in readiness to perform his part of his yearly contract, which the company refused to carry out. Demand is made in a fourth cause of action for \$250 as the necessary amount of expense for removing plaintiff and his effects back to Minneapolis, from which place he came when he first came to Spokane. The entire demand in the complaint amounts to \$1,316.90; but at the trial the court, by its instructions, entirely eliminated from the consideration of the jury the last cause of action mentioned above. The defendant by its answer set up a counterclaim for advancements made to the plaintiff, and alleged a balance of \$390.30 as owing from the plaintiff to the defendant in excess of all lawful demands in favor of the former. After a trial before a jury, a verdict was returned in plaintiff's favor for \$259.70. Judgment was entered for the amount of the verdict, and the defendant has appealed.

The first assignment of error is that the court admitted in evidence the respondent's exhibit J. This consisted of an elaborate written report prepared by respondent and handed to the appellant after the return of the former from Europe. It was an extended statement of details connected with the trip and somewhat argumentatively pointed out the necessity for certain expenditures in connection with the trip, in order to effect the best service in the interests of the appellant. In speaking of expenditures by way of showing courtesies to the European customers, the report stated as follows:

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"They claim that Garr. Scott's man, on his initiative trip there, spent over \$500. I spent some, but not quite that bad. They did not think I was quite as rich as the Garr. Scott agent, but in all my experience with the people, I left them feeling pretty good, and spent what money I thought in my judgment was to the best interests of the company. A man ought to have an allowance of two or three hundred dollars to make a trip of that kind. That will cover perhaps, shortages, loss of money, and tips."

Appellant's objection to the document as evidence is that it was prepared by the respondent and was self-serving; that the statement concerning the amount spent by Garr. Scott's man was hearsay, and probably influenced the jury to believe that the respondent had a right to recover on account of the shortage on his European trip. This report was prepared by respondent at appellant's request when the respondent returned from Europe, and when he was at the home office in Minneapolis. It was considered in detail at that time by appellant's officers and respondent, who reviewed it together. It was really made by a servant in compliance with his employer's directions, while acting in the line of his duties. It was not objected to by appellant at the time, but was apparently accepted without question, and nothing occurred to indicate that any objection would ever be made to it. Under such circumstances it cannot be said that it was prepared with a purely self-serving motive. It was a mere incident between the two parties, which was contemporaneous with the European trip—became, in fact, a part of it—was in the nature of a part of the *res gestae* of the whole transaction between the parties on that subject, and as such was admissible in evidence. *Dormitzer v. German Savings & Loan Soc.*, 23 Wash. 182, 62 Pac. 862. *Callihan v. Washington Water Power Co.*, 27 Wash. 154, 67 Pac. 697, 91 Am. St. 829, 56 L. R. A. 772.

"An instrument of writing, though *res inter alios acta*, may be admitted in evidence as a part of the transaction in controversy or as a contemporaneous memorandum to be read in connection with the oral evidence." 24 Am. & Eng. Ency.

Law (2d ed.), 688, citing *Pharr v. Gall*, 108 La. 307, 32 South. 418, where it said:

"The reception of this document in evidence was objected to on the ground that the document was *res inter alios acta*, the plaintiff not having been a party to the same except to authorize his wife. We think the document was admissible as part of the circumstantial evidence in the case. The testimony is to the effect that a proposition was made to plaintiff and was accepted, and was afterwards embodied in this document, and the document handed to him for him to get his wife's signature thereto, and that he did so. The document not having been signed by plaintiff does not *proprio vigore* prove anything against him; but it is at least a contemporaneous memorandum, the accuracy of which he cannot well gainsay, and as such it was admissible, in connection with the oral testimony."

It is assigned that it was error to deny a new trial. In support of this assignment it is contended that the evidence was insufficient to justify the verdict. We have read the entire statement of facts and, while the evidence of the parties was much at variance and materially conflicted, yet there was sufficient competent evidence to sustain the verdict, and we shall, therefore, not disturb it.

The judgment is affirmed.

FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

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Syllabus.

[No. 7331. Decided August 17, 1908.]

LOUIS HENDELMAN, *Respondent*, v. BERNHARD KAHAN *et al.*,
Appellants.¹

PLEADING—ANSWER—ADMISSIONS—MONEY LOANED. An answer as a whole admits that a sum was received by defendants as a loan, where, in an action for money loaned, the answer admits that a portion was to be regarded as a loan, and the claim is then made that the other portion was to be applied upon a board bill due from plaintiff to defendant, and which thereby paid the board bill leaving nothing further due thereon, and a further clause in the answer alleges that no part of the board bill had been paid and that the same is now due and owing, thereby neutralizing the claim that only part of the money was a loan.

TRIAL—MISCONDUCT OF JUDGE—COMMENT ON FACTS—INSTRUCTIONS. In an action for money loaned, an instruction that the defendants admitted in their answer that the plaintiff loaned them the two sums of money claimed, is not an unlawful comment on the evidence when it was not an issue in the pleadings; and in any event the same would not confuse the jury where the defendants had the benefit before the jury of their contention that only part of it was received as a loan, and where under the evidence and the whole case the jury must have understood the instruction as meaning that defendants only admitted receiving the money.

LIMITATION OF ACTIONS—ACCOUNTS—WHEN NOT CONTINUOUS—INSTRUCTIONS. Upon a counterclaim for a board bill, it is proper to instruct that the lapse of three years would defeat a recovery unless a payment had been made on the liability, without instructing that the statute begins to run only from the close of the account, where the periods covered a number of years and were so infrequent and far removed that they became independent transactions, precluding the idea of a continuous transaction.

CONTINUANCE—SURPRISE—EVIDENCE. Upon a counterclaim by defendant for a board bill it is proper to deny a continuance on the ground of surprise by reason of evidence that plaintiff had furnished money to defendants' young brother, a cousin, at their request, which fact was not pleaded in the complaint, where the same was not introduced to sustain a recovery therefor, but only to show the relations of the parties and to support plaintiff's claim that there had been no agreement to pay board during his visits to the defendants.

¹Reported in 97 Pac. 109.

TRIAL—RECEPTION OF EVIDENCE—SEPARATION OF WITNESSES—DISQUALIFICATION OF WITNESSES. The disobedience of a witness to an order excluding witnesses from the courtroom does not disqualify him, and he should not be prevented from testifying except for a party's connivance in his disobedience.

APPEAL—REVIEW—COMPETENCY OF WITNESS—DISCRETION. The refusal of the court to disqualify a witness from testifying for disobedience to an order excluding witnesses from the courtroom will not be reviewed except for an abuse of discretion.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered September 24, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover money loaned to the defendants. Affirmed.

Belt & Powell, for appellants.

Robertson & Rosenhaupt, for respondent.

HADLEY, C. J.—This is an action for the recovery of money alleged to have been loaned by the plaintiff to the defendants. There are two causes of action. The first alleges that \$1,000 was loaned at one time, and the second that \$200 was loaned at a later date. Judgment was demanded for \$1,200 and accrued interest. The defendants answered, admitting the receipt of the money, and they affirmatively alleged that the plaintiff is indebted to them for board and lodging in the sum of \$337, and in the further sum of \$64.80, for money paid by them in his behalf, making a total of \$401.80 which they claim should be deducted from the amount claimed by the plaintiff. The plaintiff concedes that the \$64.80 should be credited to the defendants, but denies that any sum is owing for board. He denies that he was at the home of defendants for as long periods as they allege, and says it was expressly understood that he was there as a guest only. He also interposes the plea of the statute of limitations against the claim for board and lodging. The cause was tried before a jury, and a verdict was returned for the plaintiff in the sum of \$1,124.10. Judgment was entered for that amount, and the defendants have appealed.

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It is assigned that the court erred in instructing the jury that the appellants admitted that the sums advanced were advanced as loans. The answer to the second cause of action, expressly admits that the sum of \$200 was advanced as a loan. The answer to the first cause of action however, states that appellants admit that respondent turned over to appellants "the sum of \$1,000 on or about the 25th day of July, 1906, a portion of which was to be regarded as a loan to defendants." For the purpose of avoiding the force of the statute of limitations as to at least a part of the account for board, the appellants now claim that when the money was paid to them, it was understood that they should deduct a sufficient sum to pay the amount of accrued board. Hence, the reason for the allegation in the answer that a part only was regarded as a loan. It is appellants' contention now that, when the money was advanced to them, the account for board was thereby paid; that no indebtedness for the board thereafter existed, but that the amount loaned was reduced by the amount necessary to liquidate the board account. If the language above quoted from the answer may be said to support appellants' present contention in this regard, its force is entirely neutralized by the following allegation in the affirmative part of the answer:

"That the room and board so furnished by defendants to plaintiff was furnished at plaintiff's request and was of the reasonable value of \$30 per month, making the value thereof the sum of \$345; that plaintiff has paid thereon the sum of \$8, and that the balance of \$337 remains due defendants."

Thus it was positively averred that the board account "remains due," which is the equivalent of saying that it is unpaid. If it is unpaid, then no part of the money advanced was applied upon the board account, and it was all loaned in fact. Therefore the effect of the whole answer is to admit that the whole sum was advanced as a loan, and the court did not err in its statement to the jury upon that subject. It is urged that the statement was a comment upon the facts,

for the reason that the fact that the whole amount was loaned was disputed. We have seen that it was not properly an issue under the pleadings. But, in any event, appellants had the benefit of the contention before the jury and, even if it were a proper contention to make under the pleadings, still we think the remark did not confuse the jury upon the subject, but that when the court said: "The defendants in their answer admit that the plaintiff loaned them these two sums of money," it must have been understood under the evidence and the whole environment of the case as meaning that they admitted that they actually received the money from the respondent.

It is next urged that the court erred in its instructions on the subject of the statute of limitations. The instruction in effect was that a lapse of three years would defeat recovery upon the open account unless a payment was made which revived the liability. The complaint is that the court did not instruct as to the law in the case as to a continuous account, to the effect that the statute begins to run from the close of the transaction or account. When exception was taken to this instruction, the court made the following remark: "I thought of that, but it seemed to me from the evidence that the different periods in which the plaintiff boarded there were entirely disconnected. There was no evidence whatever that there was one continuous transaction. If there had been, I should have submitted that phase of the law." We think the view of the trial court above expressed is correct. The periods covered a number of years and were so infrequent and so far removed from each other that they became independent transactions and precluded the idea that they were parts of one continuous transaction, or that they created one continuous account.

The third and last assignment of error is that the court denied appellants' motion for new trial on the alleged ground of accident, surprise, and misconduct. It is argued that appellants were surprised by the testimony of respondent to the

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effect that he furnished money to a young brother of appellant Paulina Kahan, and at the latter's request, for the purpose of assisting him to come from New York to Spokane, a matter not mentioned in the pleadings. It is claimed that the necessary absence of appellant Paulina Kahan at the time of the trial placed appellants at such a disadvantage that this testimony should be treated as a material surprise to them. The testimony was not given by way of charging the amount against appellants for recovery in this action, but simply by way of illustration to show that the respondent and appellant Paulina Kahan, who are cousins, did acts of accommodation for each other, merely expecting that the acts upon the one hand would compensate for those upon the other, without the creation of any legal liability either way, and that the board of respondent was furnished and accepted in this manner. It was also by way of showing that the mutual matters which had been treated as actual accounts had been settled, with the exception of the matters sued upon in this action. The testimony simply had the effect to support respondent's denial of any liability for board, and did not furnish any ground for surprise sufficient to authorize a new trial.

In connection with the last assignment of error, the young brother of appellant Paulina Kahan was permitted to testify that money was furnished to him by respondent at the sister's request, and it is claimed that he violated the rule of exclusion from the courtroom which had been applied to witnesses from the beginning of the trial. It is argued that he was kept in the courtroom by the respondent, and that it amounted to misconduct on the latter's part. The rules of decision applicable to such a situation are collectively stated as follows:

"With regard to the effect of disobeying an order putting a witness under the rule upon the competency of such witness to testify, the decisions seem to be in irreconcilable conflict. Some hold that it is discretionary with the judge to allow or forbid a disobedient witness to testify, and that the action of the court is not assignable as error. Others expressly declare that the court has no power merely for disobedience to its

order for separation to forbid the examination of a witness. The better rule appears to be that the witness should not be disqualified by the disobedience, but that his examination should in all cases be allowed, at least where the party calling him is guiltless of any connivance in his disobedience. If, however, it appears that the witness has disobeyed by the consent or procurement of the party, the court may very properly exclude him." 21 Ency. Plead. & Prac., pp. 987, 988, 989.

It will be seen that in no instance is the witness disqualified from testifying, and he should not be prevented from doing so unless his disobedience has been through the consent or procurement of the party, and in that case the court may properly exclude him; but the refusal to do so is a matter of discretion which will not be reviewed unless there is a manifest abuse of discretion on the part of the court. The record here does not show such abuse of discretion.

The new trial was properly denied, and the judgment is affirmed.

FULLERTON, CROW, ROOT and MOUNT, JJ., concur.

[No. 7257. Decided August 17, 1908.]

C. M. MILLER, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—SPECIAL FUND—DISTRIBUTION OF EXCESS—REFUNDING—PERSONS ENTITLED. Where the penalty and interest paid on delinquent assessments for a municipal improvement exceeds the warrants drawn on the special fund, thereby leaving a balance in the fund after the payment of all warrants drawn on the fund, the distribution of the excess should be to the property assessed based upon the original assessment, and the same cannot be recovered by the parties who paid the penalty and interest.

SAME—DEMANDS FOR EXCESS—LIMITATIONS—POWER OF CITY COUNCIL. In such a case, a provision in the city charter that such excess shall be refunded in case demand be made therefor within two

¹Reported in 97 Pac. 55.

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years after the date upon which assessment became due, and if not so demanded, shall be transferred to the general fund, is a reasonable statute of limitations within the power of the city council to fix, and bars a claim therefor made after the expiration of such period and nearly four years after the last outstanding warrant was paid.

Appeal from a judgment of the superior court for King county, Griffin, J., entered September 9, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover a balance left in a local improvement fund. Reversed.

Scott Calhoun, King Dykeman, and D. H. Hughes, for appellant.

C. M. Miller, for respondent.

MOUNT, J.—This action was brought to recover on account of a balance which was left in a local street improvement fund after all outstanding warrants had been paid. The trial court entered a judgment in favor of the plaintiff as prayed for. The defendant appeals.

The cause was tried below, and comes here, on an agreed statement of facts, in substance, as follows: In 1896 the city of Seattle created a local assessment district and levied assessments upon the property benefited, for paving Cherry street in the city. The assessments levied were sufficient to pay the actual cost of the improvement and no more, provided the assessments were paid before delinquency. The city ordinances provide that assessments became due on December 24, 1896, and became delinquent January 28, 1897. After delinquency a penalty of five per cent, together with current interest, was added up to June 1, 1897, and thereafter interest was added at the rate of fifteen per cent. All amounts collected were paid into the local improvement fund, and when sufficient funds were collected, the outstanding warrants were called and paid. Warrants bore interest at the rate of ten per cent. One J. D. Lowman did not pay the

assessment on his property. The same became delinquent and remained so for nearly five years. He was the last to make payment into the fund. On June 23, 1902, he paid the assessment, together with the penalty and interest, against lots owned by him. On July 31, 1902, the last outstanding warrant against this fund was paid. By reason of the penalty and interest which had accumulated on delinquent payments, a balance of \$699.23 remained in the fund after all warrants drawn against the fund had been paid. The portion of this balance paid by Mr. Lowman was \$542.12. The total balance of \$699.23 remained in the local fund until March 19, 1904. On that date it was transferred by ordinance to the general fund of the city. Mr. Lowman assigned his interest in this \$542.12 to the plaintiff, who, on June 4, 1906, made a demand upon the city for a refund of that amount, which the city refused to make. On March 8, 1907, this action was begun. The trial court was of the opinion that the penalty and interest were collected by reason of the assessment and became a part of the local improvement fund, in which the city had no interest but was merely a trustee, and that the surplus remaining in the fund after the debts were paid belonged to those who paid it in, and for that reason entered judgment in favor of the plaintiff for \$542.12, the amount he had paid in as penalty and interest.

We might readily agree that the penalty and interest collected on delinquent assessments became a part of the fund, but to hold that it belonged to the person who pays it into the fund, is to hold that the city has no power to collect a penalty beyond the actual necessities of the fund. As we understand it, it is not contended that the city has no power to collect penalty and interest on deferred payments. This power is practically conceded. The city having power and having legally collected into the fund more than was necessary to pay the cost of the improvement, it follows conclusively that the excess should belong to all the persons who have contributed to the fund, in proportion to the amount of their orig-

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inal valid assessments. In this case the assignor of the plaintiff paid into the fund no more than he was legally required to pay. There was no excess assessment against his property. It was assessed for the exact sum which it was benefited, and which he would have been required to pay had he paid at the time the assessment became due. But by reason of his default, he was required to pay a large sum as penalty and interest. This penalty and interest amounted to more than the interest on outstanding warrants, and by reason thereof, the fund was benefited to that extent. A just distribution of the excess fund thus legally increased is a division among all of the property assessed based upon the original assessment. For this reason the judgment of the lower court was erroneous.

But for another reason we think the plaintiff is not entitled to recover in this case. The city charter provides, at § 17, art. 8, as follows:

"Any funds remaining in the treasury belonging to the fund of any local improvement district, after the payment of the whole cost and expense of such improvement in excess of the total sum required to defray all the expenditures by the city on account thereof, shall be refunded, on demand, to the amount of such overpayment; and if there shall be such an excess in the assessment of any person who shall not have paid his assessment a rebate shall, on demand, be allowed to such person to the amount of such over-assessment; *Provided*, Such demand hereinbefore provided for be made within two years from the date upon which the assessment for such local improvement district became due. Any such funds remaining in the treasury after the expiration of two years from the date aforesaid for which no demand has been made as herein provided, belonging to any local improvement district, after the payment of the whole cost and expense of such improvement shall be transferred to the general fund."

No demand was made in this case until nearly four years after the last outstanding warrants were paid. It was then clearly too late under this charter provision.

It is claimed by the respondent that this provision of the

city charter is void because of art. 7, § 5 of the state constitution, which provides:

“No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.”

Assuming that an assessment for street improvements is a tax within the meaning of this constitutional provision, and that the funds created by the assessment could be applied only to that improvement, still, after the improvement is made, paid for, and a balance is left over in the city treasury, such balance must be returned to the owners or retained by the city. There can be no doubt that the city may lawfully fix a specified period within which the excess may be claimed by the owner, and if not so claimed, the right of the owner may not be enforced. This is the provision above quoted. It is a statute of limitation, and as such appears reasonable and valid. In view of this provision of the city charter, we think the action cannot be maintained.

The judgment appealed from must therefore be reversed, and the action dismissed.

HADLEY, C. J., CROW, and DUNBAR, JJ., concur.

FULLERTON, J. (concurring)—I think the city has the right to collect a penalty for the nonpayment of an assessment when due, and that when collected the penalty inures to the city. For this reason I concur in the judgment.

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* [No. 7260. Decided August 17, 1908.]

W. W. FRENCH *et al.*, *Respondents*, v. WEST SEATTLE LIGHT
& WATER COMPANY, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE—WATERS—FLOODING—DAMAGES. In an action for damages to a house and lot by the breaking of water pipe located above plaintiff's premises, which flooded the premises and left the house on the brink of a precipice, it is not prejudicial error to allow the plaintiff to state that the reason that he moved his house across the street was because he did not want to be flooded out again, where no recovery was sought or permitted for the removal of the house.

SAME—EVIDENCE OF DAMAGES—OPINIONS. In an action for damages to a house and lot by flooding, it is not error requiring a reversal to allow the plaintiff, after going into the items of his damage, to state what he estimated his damages to be from the going out of a bulkhead, although the question was for the jury.

WATERS—WATER COMPANIES—FLOODING—DAMAGES—EVIDENCE—SUFFICIENCY. Evidence that a small cottage on a hillside lot was damaged by the negligent maintenance of a water pipe line, and that a portion of the land was carried away, sustains a verdict for the plaintiffs for \$500; the amount being for the jury, they having viewed the premises.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 2, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort, after a trial on the merits. Affirmed.

Ira Bronson and D. B. Trefethen, for appellant.

King Dykeman, for respondents.

MOUNT, J.—Plaintiffs recovered a judgment for \$500 against the defendant, on account of damages resulting to a house and lot by reason of a water pipe breaking and flooding plaintiffs' premises. The defendant appeals.

¹Reported in 97 Pac. 60.

The appellant was operating a water system in the public streets of West Seattle. Respondents' house and lot were located on a side hill. The water pipe line owned by appellant was located in a street above respondents' premises. On November 10, 1906, the pipe line was found to be leaking. Appellant was notified, and attempted to repair the same. A day or two later the pipe parted at the place where the repair had been attempted, and respondents' premises were flooded. Damages were claimed in the sum of \$1,250. The case was tried to a jury, and a verdict was rendered for \$500.

It is alleged that the court erred in permitting the respondent W. W. French to answer the following question: "Well, then, I will ask why you moved the house across the street instead of on an adjoining lot." Answer: "Why, because I didn't want to be flooded out again." It appears from the evidence that the water pipe parted in the nighttime, and the water ran down the hillside during the night and throughout the next day, and flooded the house and washed away a portion of respondents' lot and the street, so as to leave the house standing on the brink of a precipice. It is argued that the question and answer were prejudicial, because they were based on the idea that the appellant might repeat the alleged act of negligence. We think this evidence was not prejudicial, in view of the fact that the water pipe had sprung a leak previously at this point, and was a menace to respondents' property. Of course, respondents were not compelled to remove their house in order to avoid such damages. Their recovery would be the same whether they removed the house or not, but the liability to dangers might have been a sufficient reason for so doing. It is not claimed that the court in its instructions to the jury permitted a recovery for the removal of the house. In fact, no error is alleged upon the instructions. We think the question and answer were not prejudicial.

It is also alleged that the following question and answer were erroneous: "Question: Mr. French, leaving out of con-

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sideration the estimate of cost of moving the house and adjusting it, how much do you consider your property damaged by reason of the going out of the bulkhead and washing away of your lot? Answer: \$1,000." This was simply an estimate of the damages after the witness had gone into the items. It is true this was a question for the jury to determine, but the estimate of the respondent is not sufficient to base a reversal upon.

The other two errors assigned are to the effect that the court erred in refusing a new trial, for the reason that there is no evidence to support the judgment, and in any event that the evidence fails to sustain a judgment for more than \$300. The evidence shows that respondents' house, which was a small cottage, was damaged, and a portion of their land was carried away, and that the damages arose from the negligent maintenance of the water pipe line. Under the evidence we are satisfied a verdict for the respondents is justified. The amount is a question of fact which was for the court and jury to determine. The latter visited the premises and probably arrived at about the correct result.

Finding no error, the judgment must be affirmed.

HADLEY, C. J., CROW, FULLERTON, and DUNBAR, JJ., concur.

[No. 7266. Decided August 17, 1908.]

WALTER LOVEDAY, *Appellant*, v. R. H. PARKER, *Respondent*,
T. A. WRIGHT *et al.*, *Garnishees*.¹

APPEAL—PROCEEDINGS—TIME FOR TAKING. An appeal from an order discharging a garnishee must be taken within fifteen days after the entry thereof, under Bal. Code, § 6502.

SAME—APPEAL FROM SEVERAL ORDERS—DISMISSAL—EFFECT. The fact that an appeal from several orders was given too late to confer jurisdiction of the appeal as to the first order made, does not operate to dismiss the appeal as to the other orders.

SAME—RIGHT TO APPEAL—CONSENT TO ORDER. An appeal from an order dismissing garnishees will not be dismissed as having been made at the request of the plaintiff, where the main case had been involuntarily dismissed, as that operated to dismiss the garnishments, and the evident intent was to show that the garnishments were dismissed solely for that reason.

SAME—CESSATION OF CONTROVERSY—COSTS—UNACCEPTED OFFER. An appeal will not be dismissed on the ground of cessation of the controversy because of a tender by plaintiff of the amount claimed to be due, made after the appeal was taken, when the tender did not include the costs and was not accepted by the appellant; since an offer to settle, not accepted, does not end the controversy.

BILLS AND NOTES—ACTIONS—COMPLAINT—CONDITIONAL MATURITY. Where a note contained the signed indorsement of the maker that he would pay the same on demand "should I make a transfer of my real estate before this note becomes due," a complaint in an action commenced before maturity is good as against a demurrer, where it sets out the note and alleges, in the language of the endorsement, a transfer of the maker's real estate, and that the note is now due and payable.

PLEADING—AMENDMENT—CONSISTENCY—BILLS AND NOTES. In an action upon a note payable on demand in case the maker transfers his real estate before maturity, an amended complaint alleging the transfer of his real estate is not inconsistent with the original complaint alleging a transfer of "certain" of his real estate, and is allowable.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered September 25, 1907, upon sustaining a demurrer to the amended complaint, dismissing an action upon promissory notes. Reversed.

¹Reported in 97 Pac. 62.

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Raymond J. McMillan, for appellant.

Marshall K. Snell, Bertha M. Snell, and R. J. Burglehaus,
for respondent and garnishee.

MOUNT, J.—This action was originally brought on two causes of action, on two promissory notes, one for \$935 payable August 1, 1907, and the other for \$930 payable August 1, 1908, both drawing interest at the rate of six per cent per annum. The notes were executed by R. H. Parker and W. M. Parker, payable to the order of Dunham, Fletcher & Coleman. On the back of each of these notes was the following: "Should I make a transfer of my real estate before this note becomes due, I agree to pay same on demand. R. H. Parker." The original complaint was filed on March 21, 1907, before either of the notes appeared to be due upon their face. It alleged the transfer of the notes for value by the payee to the Elgin City Banking Company, and by the latter company to the plaintiff for collection, and "that said R. H. Parker has since the execution of said notes made transfer of certain of his real estate, and said note, together with interest thereon, is now due and payable by him." It also alleged demand and refusal to pay. The defendant did not demur to this complaint but filed an answer, and issues were joined by a reply. At the time the complaint was filed, writs of garnishment were sued out and served upon the State Bank of Sumner and several other garnishee defendants. The State Bank of Sumner answered that it had on deposit \$1,860.97 in the name of R. H. Parker, but was not able to state whether the same was the property of the said Parker or a trust fund in his name. The other garnishee defendants answered that they were indebted to said Parker in various sums.

After the issues were made in the original case as above stated, the defendant R. H. Parker on July 9, 1907, moved to dissolve the garnishment on several grounds. At this hear-

ing, which was had on July 30, 1907, the court entered an order dismissing the garnishment against the State Bank of Sumner, and allowed the plaintiff ten days within which to file an amended complaint, and defendant R. H. Parker thereupon paid the note due August 1, 1907, and subsequently, within the ten days allowed therefor, the plaintiff filed an amended complaint declaring upon the second note, and changed the allegation relating to the transfer of defendant's real estate so as to read as follows: "That said R. H. Parker has since the execution of said note made a transfer of his real estate, and said note together with interest thereon from August 1, 1907, is now due and payable by him." Defendant R. H. Parker demurred to said amended complaint on the ground that it did not state a cause of action. This demurrer was sustained on August 24, 1907. Thereafter, on September 3, 1907, plaintiff gave notice that he elected to stand on the allegations of the amended complaint, and refused to plead further. On September 25, 1907, the court entered an order dismissing the action, and on September 30, 1907, an order was entered discharging the "remaining garnishment defendants." On October 5, 1907, the plaintiff gave notice of appeal from the order of July 30, dismissing the writ of garnishment against the State Bank of Sumner, also from the order of September 25 dismissing the action, and also from the order of September 30 discharging the remaining garnishees.

Respondent moves to dismiss this appeal upon the following grounds: (1) That this court has no jurisdiction of the appeal herein in so far as same purported to be an appeal from the order of July 30, 1907, dismissing the garnishment against the State Bank of Sumner, for the reason that no notice of appeal from such order was given within the time provided by law: (2) that the appellant is precluded from appealing from the judgment of dismissal of the remaining garnishments giving judgment for costs to said State Bank

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of Sumner, as entered September 30, 1907, for the reason that the same was made and entered on the application of appellant; (3) that the respondent has, since this appeal was taken, tendered to appellant the amount in controversy, and at most there remains to be litigated but a trifling amount of costs.

There can be no doubt that the notice of appeal in this case came too late to give this court jurisdiction to review the order of July 30, discharging the writ of garnishment against the State Bank of Sumner. The notice of appeal was not given until October 5, 1907, which was much more than fifteen days required by statute in such cases. Bal. Code, § 6502 (P. C. § 1050). But the fact that the order of July 30 cannot be reviewed does not operate to dismiss the appeal as to other orders which may be reviewed. The second ground for dismissal is based upon the fact that appellant requested the court to enter the order of September 30, discharging the "remaining" writs of garnishment. The evident intent of the court in making and entering this order was to make clear the fact that these writs were discharged solely by reason of the dismissal of the main case. It was not voluntarily made at the request of the appellant. The court had ruled adversely to the appellant, and the order was made to show the facts. It was probably unnecessary to make the order of September 30, because the dismissal of the action discharged the garnishees by operation of law. *Seattle Trust Co. v. Pitner*, 17 Wash. 365, 49 Pac. 505.

The last ground of the motion is based upon the fact that, after the appeal was taken, the respondent tendered to the appellant the amount of the note sued upon with interest. There was no tender of costs, and appellant refused the tender. There has been no settlement of the controversy. It still exists. If appellant had accepted the offer another question would be presented. A mere offer of settlement where there is a refusal to accept does not settle the controversy. The motion to dismiss must therefore be denied.

The main question in the case is whether the court erred in sustaining the demurrer to the amended complaint. The complaint, among other things, alleged "that at the time of the execution of said note, before delivery thereof and as part of the consideration for the acceptance of said note by said Dunham, Fletcher & Coleman, the said R. H. Parker indorsed said note as follows: 'Mar. 15, 1905. Sould I make a transfer of my real estate before this note becomes due, I agree to pay same on demand. R. H. Parker'; that no part of the principal or interest of said note has been paid except interest thereon from August 1, 1907, and no more; that said R. H. Parker has since the execution of said note made a transfer of his real estate, and said note together with interest thereon from August 1, 1907, is now due and payable by him." This amended complaint is clearly sufficient as against a demurrer. The allegations in regard to a transfer of real estate might have been more definite or particular, but the ultimate facts are stated specifically in the language used in the note. The court might have required a more definite or particular statement of the facts upon motion therefor, but for the purpose of testing the sufficiency of the complaint by demurrer the ultimate facts stated are clearly sufficient to show that the note was due. *Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549. The difference between the original complaint and the amended one upon this particular note is that the original complaint alleged that respondent has "made transfers of certain of his real estate," while in the amended complaint it is alleged that respondent has "made a transfer of his real estate." Respondent argues that these allegations are inconsistent with each other. They are different, no doubt, but the inconsistency is not of the character prohibited by statute. The one does not necessarily contradict the other, and may therefore be pleaded in the same pleading. *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360. We have no doubt that the amendment was proper and that the complaint states a cause of action.

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The judgment of dismissal must therefore be reversed, and the cause remanded for further proceedings.

HADLEY, C. J., FULLERTON, and RUDKIN, JJ., concur.

DUNBAR and CROW, JJ., took no part.

[No. 7278. Decided August 17, 1908.]

M. L. CAVANAUGH *et al.*, *Appellants*, v. MILNOR ROBERTS,
Respondent.¹

TAXATION—PAYMENT—EVIDENCE—SUFFICIENCY. Upon an issue as to whether plaintiff had deposited sufficient money to redeem delinquent tax certificates, the court properly found that he did not, where the testimony of his son, who was working in the treasurer's office and directed the application of \$1,600 deposited for that purpose, was that more than enough had been deposited and part of the deposit was returned, while the county treasurer and his deputies testified that the deposit was not sufficient and notice thereof had been given to the son, who was requested and refused to make a further deposit.

TAXATION—CERTIFICATE OF DELINQUENCY—TIME FOR ISSUANCE. Under Laws 1897, p. 183, § 98, which designated no particular time for the issuance of a certificate of delinquency to a county, a certificate on the taxes for 1895 could be issued on January 31, 1898.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 4, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to set aside a tax deed. Affirmed.

S. S. Langland, for appellants.

Bausman & Kelleher, for respondent.

MOUNT, J.—This action was brought by the appellants to set aside a tax deed issued by King county. Judgment was rendered in favor of the defendant, and the plaintiffs appeal.

¹Reported in 97 Pac. 55.

It appears that on January 31, 1898, the county of King issued a certificate of delinquency to itself, for unpaid taxes on the land in question, for the last half of the year 1895. On December 31, 1901, the county commenced foreclosure of this and many other certificates of delinquency. In November, 1902, pursuant to a decree of foreclosure, the land was sold to Phillips Morrison. The respondent, Milnor Roberts, has succeeded by mesne conveyance to the interest of Mr. Morrison. The complaint attacks the county treasurer's deed upon two grounds: (1) that the foreclosure proceedings were irregular; and (2) that the taxes for which the certificate was issued were in fact paid.

The principal issue of fact at the trial was whether or not the appellants had deposited the money with the treasurer for the payment of the taxes due and delinquent upon this tract of land for the last half of the year 1895. The appellants owned a number of tracts of land in King county. The taxes were delinquent and unpaid and certificates of delinquency had been issued against all of the lands belonging to the appellants. In the year 1899 the appellants deposited something more than \$1,600 with the county treasurer of King county, for the purpose of redeeming these certificates and paying subsequent taxes. The appellants' son at that time was a clerk in the office of the county treasurer, and directed the application of this money. It was applied to the redemption of all the outstanding certificates with the exception of the one in question, but taxes were paid on this tract of land subsequent to the year 1895. The certificate of delinquency, however, was not redeemed for that year, because sufficient funds had not been deposited therefor. The evidence fairly shows that the appellants' son, who was attending to the matter, was notified to that effect. He testified that money more than sufficient was deposited to redeem this certificate, and that a balance was returned to him. This fact was denied by the county treasurer and his deputies who had charge of the matter, who testified that no money was re-

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turned to the appellants or their son, but that on the other hand the son of the appellants was notified and knew that sufficient funds had not been deposited to redeem this certificate, and that the son was requested upon different occasions to make a deposit sufficient for that purpose and refused to do so. Upon this state of the evidence, we think the trial court properly found that the delinquent tax for the year 1895 had not been paid, nor sufficient funds deposited with the county treasurer for that purpose.

Appellants argue that the foreclosure proceedings were void because the certificate of delinquency was issued on January 31, 1898, while under the statute of 1897 such certificates could not be issued to the county until after that time. But we have held otherwise in *Jefferson County v. Trumbull*, 34 Wash. 276, 75 Pac. 876, and *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267.

Several other questions of a similar character, and also the constitutionality of the revenue act, are presented in appellants' brief. These questions are completely answered by respondent in his brief, and inasmuch as we have passed upon all these questions in many cases heretofore, we think it unnecessary to consider them further in this case.

We find no error in the record, and the judgment is therefore affirmed.

CROW, RUDKIN, and DUNBAR, JJ., concur.

[No. 7373. Decided August 17, 1908.]

JOHN KALBERG *et al.*, *Appellants*, v. GEORGE MEADE *et al.*,
Respondents.¹

CANCELLATION OF INSTRUMENTS—CONTRACTS—RESCISSION—FRAUD—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant the rescission and cancellation of an assignment of a contract for city work, on the ground of fraud and misrepresentations as to the value of a note given therefor and the inability of the assignee to complete the work on time, where it appears that the note was perfectly good, no fraud was shown, and the contractors under the assignee were progressing rapidly with the work, which would be completed on time.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 16, 1907, upon findings in favor of the defendants, in an action for rescission. Affirmed.

John S. Jurey, for appellants.

McClure & McClure, for respondents.

MOUNT, J.—This action was brought by the plaintiffs to rescind a contract between the plaintiffs and the defendants, and also for injunctive relief. The trial court, after a trial, made findings in favor of the defendants and entered judgment accordingly. The plaintiffs have appealed.

It appears that the city of Seattle, on August 17, 1907, entered into a contract with the appellants, by which the city agreed to pay to the appellants approximately \$52,000 for making certain street improvements, the work to be completed within two hundred and seventy days after the date of the contract, and after direction by the board of public works to the appellants to commence work under the said contract. The appellants were required to, and did, give a bond to the city in the sum of \$78,000 for the faithful performance of the

¹Reported in 97 Pac. 59.

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contract. On August 17, 1907, the board of public works notified the appellants to commence work immediately under the contract. On August 10, 1907, before this contract had been executed, but after it had been let to the appellants, they assigned the same to the respondents by the following written agreement:

"This agreement, made the tenth day of August, A. D. one thousand nine hundred and seven, between Kalberg & Co., of the city of Seattle, county of King, and state of Washington, and Meade & Co., of the same place, WITNESSETH:

"That the said Kalberg & Co., agree to sell, and do hereby sell, to the said Meade & Co., all their right, title, interest and property in and to one certain contract entered into by and between the City of Seattle, a municipal corporation of the first class, and Kalberg & Co., under date of _____ 1907, for the improvement of 13th Avenue et al. South, in the city of Seattle, county of King, and state of Washington, by grading, under ordinance No. 15,117 of said city of Seattle, creating local improvement district No. 1387.

"In consideration whereof the said Meade & Co. agree to pay unto the said Kalberg & Co. the sum of three thousand (\$3,000) dollars, lawful money of the United States, on the day of 190.... The said Meade & Co. agree to take over and assume said contract and to faithfully perform each and every condition and requirement contained therein, and the said Meade & Co. also agree to assume the bond to be given for the faithful performance of said contract, and to save the said Kalberg & Co. free and harmless from any and all liability or expenses of any kind or nature whatsoever; said bond to be in the sum of \$78,000."

When this assignment was executed, the respondents executed and delivered to appellants their promissory note for \$3,000, due in nine months, with interest at the rate of eight per cent per annum, and the appellants executed and delivered their note to the respondents for \$180, the agreement being that the \$3,000 was to be paid when the street improvement contract with the city was completed. The \$180 note was to offset interest for that length of time. After this as-

signment was made, the respondents procured a bond in the sum of \$78,000 for the faithful performance of the contract assigned to them, and delivered this bond to appellants. After this assignment was made, the respondents sublet all the work to different parties at prices which would net the respondents about \$8,000. The city took no formal notice of the assignment of the contract by the appellants to respondents or to the other subcontractors, but recognized the rights of each subcontractor to do the actual work. Some two or three months after these written agreements were signed, the subcontractors proceeded with the work, and the city engineer, who under the original contract was authorized to direct the progress of the work and to whose satisfaction the work should be done, thinking that the contract required the work to be completed within two hundred and ten days instead of two hundred and seventy days, notified the appellants to proceed more rapidly with the work, and the appellants contend that they notified the respondents to the same effect. Respondents, however, dispute this. At any rate, in October, 1907, appellants sought to rescind the assignment above set out, and offered to return to respondents the note for \$3,000, and attempted to exclude the respondents and their subcontractors from further prosecuting the work. Respondents resisted, and this action was begun.

The complaint alleges, that the respondents falsely represented to appellants that the note for \$3,000 was good and could be cashed, when in fact it could not be cashed and was of no value, and that appellants relied on such representations and were thereby induced to enter into the assignment of the contract, and were thus cheated and defrauded; that the bond given by the respondents to the appellants was of no effect; that the respondents failed to enter upon the work or to prosecute the same as required by the contract and by the city engineer; that the city was about to cancel the contract with the appellants, and that in case of such cancella-

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tion the appellants, under the laws of the city, would be ineligible to procure city work thereafter for a period of two years, and thus they would be irreparably injured. These allegations were all denied.

If we concede in this case that the appellants may maintain this action in equity for a rescission of the contract, notwithstanding they required the respondents to execute a bond with sureties and received the bond and made no objection thereto, still we are satisfied from a reading of the evidence that the appellants wholly failed to make a case in any particular. No fraud was shown. The note appears to be perfectly good, and the respondents amply able to meet it when it becomes due. The evidence was in conflict as to whether the respondents, at the time they executed the note, represented that the same could be cashed immediately. The evidence shows that notice was served upon the respondents by the city engineer to proceed more rapidly with the work. But this notice was given under a misapprehension of the time within which the contract was to be completed. It also appears that the work was progressing rapidly at the time the appellants attempted to interfere with the respondents, and that the entire contract would be completed readily within the time limited by the contract. Nor was any action taken by the city looking to a cancellation of the original contract, except the notice above referred to, given under a misapprehension of the time of the contract. Several propositions of law are argued in appellants' brief, but the case, as we conceive it, depends entirely upon questions of fact. We are unable to find in the record sufficient evidence to sustain the allegations of the complaint, or any reasonable basis for a contention that the court erred in any of its findings or conclusions.

The judgment must therefore be affirmed.

CROW, ROOT, RUDKIN, and DUNBAR, JJ., concur.

[No. 7384. Decided August 17, 1908.]

JOHN S. JUREY, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—DIVERSION OF FUND—LIABILITY OF CITY—ACTIONS—PRESENTATION OF CLAIM. The right of action against a city for the wrongful diversion of a special assessment fund or for the wrongful failure and neglect to collect the same, is not upon the warrants against the fund or upon contract, but sounds in tort for damages; and hence no action can be commenced thereon without the presentation of a claim to the city, under charter provisions requiring all claims for damages to be presented to the city council and filed with the clerk within thirty days after the accrual of the claim, accurately locating and describing the defect that caused the injury, and providing that no action shall be maintained against the city for any claim for damages until after the lapse of sixty days after such presentation.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 3, 1908, upon sustaining a demurrer to the complaint, dismissing an action for the wrongful diversion of a special assessment fund. Affirmed.

Ralph Simon (*Louis H. Legg* and *John S. Jurey*, of counsel), for appellant.

Scott Calhoun and *H. D. Hughes*, for respondent.

MOUNT, J.—This action was brought against the city of Seattle to recover the amount of a special assessment warrant, on the ground that the city negligently and wrongfully permitted the fund to become depleted and had paid warrants drawn on said fund subsequent to plaintiff's warrant, leaving plaintiff's warrant unpaid. The trial court sustained a demurrer to the complaint upon the ground that the complaint failed to state a cause of action, and dismissed the action. The plaintiff appeals.

¹Reported in 97 Pac. 107.

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The facts as alleged are, in substance, as follows: In June, 1890, an ordinance was passed, providing for the improvement of Rainier street, and creating a local improvement district to pay therefor. Assessments were levied upon the property of the district, and a special fund was created into which the assessments were paid as collected. Warrants were issued against this fund and delivered to the contractor in payment for the improvement. These warrants upon their face recited that they were payable only out of the special fund and constituted no liability against the city. The assessment became delinquent on February 23, 1891, and on January 3, 1891, the warrant in question was presented and not paid for want of funds. Again, in 1904, the warrant was presented by the appellant and payment refused for the same reason. In 1908 this action was begun. The allegations upon which the appellant seeks to charge the city are as follows:

“That the defendant city undertook and agreed with the owners and holders of the said warrants, and it was its duty under and by virtue of the laws of the state of Washington, said ordinance No. 1394, the charter and ordinances of the defendant city, and the said contract for the making of said improvements, to proceed with all reasonable diligence, care and caution to collect the said assessments, interest, and penalty made upon the said property included within the said district for the payment of said improvement, and pay the same into the said special fund, and pay out the same upon the said warrants issued and delivered against said fund as aforesaid, for the payment of said improvement according to and in the order of the issue, number and preference right of payment of said warrants; that pursuant thereto the defendant city did collect and receive certain of the assessments aforesaid upon certain of the property within said district and assessed as aforesaid, in cash and cash value, and paid the same into the said special fund or applied the same on account thereof, and did commence suits to foreclose the lien of the remainder of said assessments upon the remainder of the said property so assessed and within said district, and

to collect the same, but failed, neglected and refused to diligently prosecute said suits and to prosecute said suits at all, and carelessly and negligently and wrongfully compromised and settled the said suits and the judgments rendered in some thereof, and all of the remainder of unpaid assessments for said improvement, for sums far less than the amount due and collectible on said assessments sued on, or compromised and settled, and carelessly and negligently and wrongfully in such compromises and settlements released and discharged the property included within said district and upon which the assessments so compromised and settled were levied and a lien, from the lien of such assessments thereon, and carelessly and negligently and wrongfully caused and suffered the balance of the principal, interest and penalty due and collectible on said assessments on said property, together with the lien thereof on said property to be wholly and totally released, discharged, destroyed and lost; that the defendant city carelessly and negligently and wrongfully paid out of said special fund, interest on warrants against the same to the amount of more than \$100 in excess of the sum lawfully and rightfully due and owing on such account; that the defendant city carelessly and negligently and wrongfully in the settlements and compromises aforesaid received and accepted as cash warrants issued against said special fund subsequent in date, number and preference right of payment to the said warrant owned by plaintiff; that by reason and because of the negligent and careless and wrongful acts of the defendant city aforesaid and the release and discharge of the lien of such assessments upon the property within said district more than the sum of \$6,494.29 remaining due and collectible as principal, interest and penalty on the said assessments has been wholly and totally destroyed and lost to the said special fund and to the owners and holders of said warrants, and which said sum so destroyed and lost to said special fund is more than sufficient to pay in full all of the principal and interest due and payable upon all of the outstanding and unpaid warrants issued as aforesaid against said special fund, prior in date of issuance, number and preference right of payment to the said warrant held by plaintiff, and to pay in full the balance of principal and interest due and payable on the said warrant owned by plaintiff; that the defendant city carelessly and negligently and wrongfully paid out and applied to the

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payment, satisfaction and cancellation of warrants issued against said special fund as aforesaid, and subsequent in date of issuance, number and preference right of payment, to the said warrant held by plaintiff, cash and cash value, received and accepted by the defendant city in the compromises and settlements of assessments aforesaid, and collections on said assessments, more than the sum of \$2,567.46 and more than sufficient to pay in full all of the principal and interest due and payable on all of the outstanding and unpaid warrants issued as aforesaid against said special fund, prior in date of issuance, number and preference right of payment, to the warrant so held by plaintiff, and to pay in full the balance of principal and interest due and payable on the said warrant held by plaintiff."

According to the allegations of the complaint, the depletion of the fund arose from four causes: (1) The failure of the city to collect certain assessments; (2) the compromising of other assessments so that only a part thereof was paid into the fund; (3) the payment of warrants subsequent in order of right to that owned by plaintiff, and (4) the acceptance of warrants in payment of assessments. It is by reason of these alleged wrongful and negligent acts that the appellant now seeks to hold the city liable for the amount of the warrant in question. The complaint does not allege that any claim for damages was presented to the city prior to the bringing of this action. The city charter provides as follows:

"All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference.

"All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed, and be sworn to by the claimant.

"No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation." Seattle Charter, art. 4, § 29.

The basis of this action does not rest upon contract, as argued by the appellant. It rests solely upon the alleged wrongful acts of the city in receiving and diverting the fund from its proper use. The city was not liable upon these special fund warrants. They are not obligations of the city. The holders were required to look to the special fund solely for their payment. *State ex rel. American Freehold-Land Mtg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321; *Soule v. Ocosta*, 49 Wash. 518, 95 Pac. 1083, and cases there cited. When the city wrongfully diverted such special fund from its appropriate use, the city thereby committed a wrong which made it liable for the amount of such diversion. If the appellant was damaged, he could recover to the extent of such diversion, and not otherwise. *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259, 67 Pac. 710, and cases there cited. We said in this last-named case, at page 262:

"But it is plain that a city, by misappropriating moneys belonging to a special fund, does not render itself liable to pay the warrants drawn upon that fund, as if they were warrants drawn upon its general fund. In other words, the act of misappropriation does not make such special fund warrants general fund warrants of the city. The city's liability arises from its wrongful act, and is measured by the amount of the fund misappropriated. The remedy of an injured party for a wrong of this kind would ordinarily be by an action sounding in damages for the injury suffered . . . "

This rule is not in accord with statements in *German-American Sav. Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259, and *Sheafe v. Seattle*, 18 Wash. 298, 51 Pac. 385, to the effect that an action of this kind arises *ex contractu*, and such statements in those cases must be considered as overruled. This being an action for damages, a claim therefor should have been filed within thirty days after knowl-

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edge of the diversion of the fund, as provided for by the section of the charter above quoted. *Postel v. Seattle*, 41 Wash. 482, 83 Pac. 1025. The complaint, failing to allege such fact, was insufficient.

The judgment is therefore affirmed.

HADLEY, C. J., and CROW, J., concur.

DUNBAR, J., concurs in the result.

FULLERTON, J. (concurring).—In my opinion the right to recover on the warrants in suit is barred by the statute of limitations. For that reason I concur in an affirmance of the judgment.

[No. 7228. Decided August 19, 1908.]

AARON H. FOOTE *et al.*, Respondents, v. E. L. ROBBINS,
Appellant.¹

FRAUDS, STATUTE OF—REAL ESTATE—BROKER'S COMMISSIONS—TERMS OF CONTRACT. Under LAWS, 1905, p. 110, which requires an agreement authorizing or employing a broker to sell or purchase real estate for compensation or a commission to be in writing, signed by the party to be charged, etc., brokers cannot recover for commissions under a written contract giving them exclusive authority to sell real estate, where it contained no agreement for the payment of the commissions; as the same is insufficient to take the case out of the operation of the statute of frauds, and parol evidence as to an agreement for commissions is inadmissible.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 2, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to recover a broker's commission. Reversed.

Walker & Munn and *S. M. Brackett*, for appellant.

Frederick R. Burch and *Martin Rozema* (*John A. Saboe*, of counsel), for respondents.

¹Reported in 97 Pac. 103.

CROW, J.—Action by Aaron H. Foote and Millard F. Perry, copartners as Foote & Perry, against E. L. Robbins, to recover a broker's commission for selling certain real estate belonging to the defendant. Upon trial without a jury, findings of fact, conclusions of law, and a judgment were entered in favor of the plaintiffs, from which the defendant has appealed.

The trial court found that the respondents were copartners as real estate agents and brokers in the city of Seattle; that on or about August 20, 1905, the appellant executed and delivered to respondents an undated written instrument reading as follows:

“UNIFORM REAL ESTATE CONTRACT FOR THE STATE OF
“WASHINGTON.

“In consideration of valuable services to be performed by you in endeavoring to effect sale of the following described real property: [Description] I hereby give you the exclusive sale of the above described property for the period of thirty days from the date hereof and thereafter until withdrawn by ten days' written notice, and upon receipt of the purchase price I agree to make a good and sufficient conveyance to said described property by warranty deed to the person or persons designated by you. The price of said property to be \$12,400 net and upon the following terms, to wit: Cash, on delivery of deed. In case of sale of the above described property by or through you, I further agree to furnish a complete abstract of title to said property.

“E. L. Robbins, owner. Address: South Park.”

that, pursuant to such instrument and while the same was in full force and effect, the respondent, on or about September 30, 1905, procured a purchaser for the real estate who was ready, able and willing to buy the same, and pay \$13,000 cash therefor.

The appellant, with other assignments of error not necessary to state or discuss, contends that the trial court erred in its conclusions of law to the effect that, by the terms of the written agreement, appellant covenanted to pay the respond-

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ents a reasonable commission for the sale of the real estate. This contention is based upon Bal. Code, § 4576 (P. C. § 5843), of the statute of frauds, as amended by chapter 58, Laws of 1905, page 110, reading as follows:

"In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: . . . (5) An agreement authorizing or employing an agent or broker to sell or purchase real estate *for compensation or a commission.*"

Appellant contends that the written instrument executed by him does not by its terms provide for any commission or compensation to respondents to be paid by him. In *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361, this court, in discussing the above section, said:

"We think it is manifest that the legislature intended to reach such contracts only as involve the relations of an owner and his agent with respect to the recovery of compensation or commission for services in selling or purchasing real estate . . . The contract which the statute declares to be void unless in writing is *one for the payment of a commission to the agent*, but it does not say that the actual authority to sell or purchase must be in writing."

The agreement before us contains no written stipulation for the payment of a compensation or commission to respondents. The original instrument itself, which is attached to and made a part of the statement of facts, was executed upon a printed form, and shows that the parties erased the following printed words, "and to pay you a commission of \$——." These were the only printed words referring to the matter of the payment of a commission. Their erasure indicates an intentional refusal upon the part of the appellant to make any such payment, and an assent to such refusal by respondents who drew the instrument. If by the written agreement the payment of a commission by respondents was contemplated,

resort must now be had to oral evidence for the purpose of showing the amount of such commission, and that it was to be paid by the appellant as vendor and not by the purchaser as vendee. The unmistakable purpose of the statute was to avoid any such method of fixing the extent of the liability, or the liability itself, of either a vendor or a vendee for the payment of a commission.

In *Zimmerman v. Zehender*, 164 Ind. 466, 73 N. E. 920, which we cited and commented upon with approval in *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473, the supreme court of Indiana said:

"In short, the contract, in so far as it relates to this action, is only partially in writing. The important feature—the amount of commission to be paid, is to be ascertained by parol testimony in regard to an understanding which may prove to be a misunderstanding, the exact thing which the statute was designed to prevent. A contract partly written and partly verbal is a parol contract, and contracts required by law to be in writing must be wholly written to be enforceable. . . . A material part of the contract in suit being verbal, it must be held to be an oral contract, and therefore invalid."

The contract before us is utterly silent upon the question of appellant's liability for the payment of a commission; yet the substantial purpose of the statute was to require that a contract fixing such a liability should be invalid unless in writing. If we were to hold that such a liability may be here shown by parol, simply because the appellant had written authority to make a sale, although such authority neither mentions nor provides for the payment of, or amount of, a commission, we would so construe the statute as to invite and promote the identical frauds which it was intended to avoid. Applying the principles announced in the cases above mentioned, we hold that the contract is not a sufficient compliance with the statute to enable the respondents to recover.

The judgment is reversed, and the cause is remanded with instructions to dismiss the action.

HADLEY, C. J., FULLERTON, and MOUNT, JJ., concur.

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[No. 7123. Decided August 21, 1908.]

THE FARRELL COMPANY, *Respondent*, v. MRS. C. IHRIG,
Appellant.¹

APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. The granting of a new trial on the ground of insufficiency of the evidence will not be reviewed where there is a conflict in the testimony, except for abuse of discretion.

Appeal from an order of the superior court for King county, Gilliam, J., entered September 8, 1907, granting plaintiff a new trial, after a verdict rendered in favor of the defendant, in an action of forcible entry and detainer. Affirmed.

Kerr & McCord and *Vince H. Faben*, for appellant.

Frank M. Egan and *Higgins, Hall & Halverstadt*, for respondent.

CROW, J.—Action commenced January 8, 1907, by The Farrell Company, a corporation, against Mrs. C. Ihrig, in forcible entry and detainer, to recover possession of real estate in the city of Seattle. The plaintiff alleged that it had leased the property to the defendant at a monthly rental of \$300, payable in advance on the first day of each month; that by proper legal notice, duly served, it had terminated such tenancy, and that the defendant wrongfully continued in possession. Upon the giving of bond, a writ of restitution was issued, under which the defendant was evicted, and the plaintiff was placed in possession pending the prosecution of this action. The defendant by her answer and evidence contended that on or about May 1, 1905, the plaintiff had leased the property to one Thomas Carstens, for a term of three years from that date, at a rental of \$300 per month; that with plaintiff's knowledge and consent, Carstens, on or about De-

¹Reported in 97 Pac. 52.

cember 1, 1905, assigned this lease to the defendant, and placed her in possession; that the lease had been lost and could not be found; that since taking possession, the defendant had continually paid monthly rental under the lease, which the plaintiff received, and that the defendant was entitled to continue in possession until May 1, 1908. The plaintiff denied that it had executed any lease to Carstens, or that the defendant was its tenant, except as alleged in its complaint. The controlling issue between the parties was whether the three-year lease had been executed and delivered. On a trial of this issue, the jury returned a verdict in favor of the defendant. The plaintiff filed and served its motion for a new trial which was granted by an order reading as follows: "It is therefore ordered, adjudged and decreed that said motion for a new trial be granted upon the sole ground that there is not sufficient evidence in the case to justify the verdict." From this order the defendant has appealed.

Appellant's only contention is that the trial court erred in granting the new trial. After a careful examination of all the evidence, we do not regard it as sufficient to sustain the finding which the jury must have made, to the effect that the three-year lease had been executed and delivered to Carstens and assigned to appellant as contended by her. Assuming, however, that the evidence offered by appellant tended to sustain her allegation of the execution, delivery, and assignment of the lease, yet the evidence of respondent's witnesses was direct and positive to the effect that no such lease had ever been executed or delivered. It also appeared that the alleged lease could not be found or produced. We have repeatedly held, in actions where there was a substantial conflict of evidence, that the granting of a new trial on the ground of insufficiency of evidence to support the verdict of a jury is discretionary with the trial court, and that the exercise of such discretion, in the absence of its abuse, will not

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be reviewed by this court. *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *Friedman v. Manley*, 21 Wash. 43, 56 Pac. 832; *O'Rourke v. Jones*, 22 Wash. 629, 61 Pac. 709. As we find nothing in the record suggesting any such abuse, the order granting the new trial must be sustained.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, and DUNBAR, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 7189. Decided August 22, 1908.]

FRANK E. SCHAAD, *Respondent*, v. A. E. ROBINSON *et al.*,
Appellants.¹

MORTGAGES—FORECLOSURE—ANSWER—PAYMENT—FRAUD. An answer states a good defense to the foreclosure of a mortgage, where it alleges that the same is paid and satisfied and that the satisfaction was being withheld and the foreclosure is being prosecuted as a fraudulent conspiracy to eliminate defendants' liens against part of the property.

SAME—PARTIAL RELEASE—EFFECT ON SUBSEQUENT LIENS. The release by a mortgagee of a portion of mortgaged premises sufficient to satisfy the mortgage debt, after notice of the liens of judgment creditors of the mortgagor upon the balance of the mortgaged property, discharges the mortgage as to all the property.

SAME—NOTICE TO MORTGAGEE—PLEADING—SUFFICIENCY. An allegation in an answer that a mortgagee had full and actual knowledge of subsequent liens upon part of the mortgaged premises at the time he released other portions of the property from the mortgage, is a sufficient allegation of notice operating to release *pro tanto* the balance of the property.

PLEADING—DEMURRER—DEFINITENESS. Want of definiteness in an answer must be taken advantage of by motion and not by demurrer.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered October 21, 1907, in favor of the plaintiff, upon sustaining demurrers to the affirmative defenses, in an action to foreclose a mortgage. Reversed.

¹Reported in 97 Pac. 104.

Charles E. Miller and Welsh, Welsh & O'Phelan, for appellants.

Sol. Smith, for respondent.

HADLEY, C. J.—This action was instituted to foreclose a mortgage. The mortgage and note secured thereby were executed by the defendant Doan. The note was for \$2,050, payable to the defendant Wasson. The mortgage was afterwards transferred by written assignment from Wasson to plaintiff in this action, and this suit is maintained by the assignee. The mortgage as executed covered the following real estate, to wit: Lots 1, 2, 3, and 4, of block 2, of the South Bend Land Company's first addition to the city of South Bend; also lot 1, of block 11, of Alta Vista addition to South Bend. The plaintiff in this action seeks foreclosure upon the lot last above mentioned and upon no more. In the formal allegations of the complaint, the mortgage is not described as covering any lots other than the one in Alta Vista addition. The defendants Robinson and Carstens Packing Company were made defendants because it is alleged that each claims a lien against the lot which is junior to the plaintiff's mortgage lien. The defendants Peters were made defendants as the present holders of the legal title.

In answer to the complaint, the defendants Robinson and Carstens Packing Company filed separate affirmative defenses. The substance of their extensive allegations may be epitomized as follows: That about June 20, 1906, the mortgagor Doan, while at Los Angeles, California, sold said lots 1, 2, 3, and 4, of block 2, of the land company's addition, to the defendants Peters, the sale being subject to the mortgage, and that, for the purpose of defrauding creditors, the deed evidencing the sale was, at the direction of Peters, taken in the name of Marion Cheek; that Doan, who was indebted to each of the answering defendants, absconded and left the state of Washington, and thereupon each of these defendants sued him for the amount respectively owing; that Doan was

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the record owner in fee of lot 1, block 11, of Alta Vista addition, and in each action against him these defendants attached the lot and thereafter obtained judgments against the attached property, which was afterwards sold under the order of court to pay the judgments, each of these defendants becoming a purchaser for the amount of his judgment; that on the 28th day of November, 1906, the plaintiff in this action, claiming to be the owner and holder of the mortgage, for the consideration of \$550 released from the lien of the mortgage the lots in the land company's addition, thereby leaving the single lot in Alta Vista addition, which was attached by these defendants, to be alone charged with the balance due upon the mortgage, to wit, \$1,682.47; that thereupon the plaintiff brought this suit to foreclose the mortgage against the one lot in Alta Vista addition and not against any of the others covered by the mortgage; that the lots which were released from the mortgage are, and at all times have been, of the aggregate value of \$4,000, while the remaining lot is, and at all times has been, of the value of \$1,250 and no more; that at and prior to the time the plaintiff released the four lots from the lien of the mortgage, he had full and actual notice and knowledge that each of these defendants was a judgment creditor of Doan, and that he had a valid attachment and judgment against the unreleased lot; that he also knew that the combined property covered by the mortgage was ample to pay the mortgage debt and all of the indebtedness of Doan, but that the unreleased lot against which he knew the defendants had attachment judgments was not sufficient to pay even the balance due on the mortgage.

It is also alleged that, at the time the action was commenced, the plaintiff had no interest in the mortgage, but that for the purpose of cheating and defrauding the defendants and other creditors of Doan, the plaintiff and the defendant Peters conspired together and caused said release to be made; that they caused it to appear that there was a bal-

ance due on the mortgage which was a valid lien upon the unreleased lot, and in pursuance of such fraudulent conspiracy they caused this action to be commenced; whereas, in truth, the mortgage had been fully paid and satisfied; that for the purpose of effectuating the fraud, Doan and Peters caused the mortgage to be assigned to the plaintiff notwithstanding it was fully paid, and that they procured the plaintiff to release all the property covered by the mortgage except that which was attached by these defendants. The plaintiff interposed general demurrers to the above-stated defenses, and the demurrers were sustained by the court. The defendants declined to plead further, and at the trial they offered generally to make proof in support of their affirmative defenses, which was refused. Judgment was entered foreclosing the mortgage against the one lot in Alta Vista addition for the sum of \$1,779.77 and costs, and barring all rights of all the defendants therein. The defendants Robinson and Carstens Packing Company have appealed.

Many errors are assigned upon the introduction of evidence and upon the findings made by the court. The extended discussion required to pass upon all of these we believe is unnecessary, in view of the result which we think must be reached on the appeal. We shall confine our discussion to the assignments that the court erred in sustaining the demurrers to the appellants' affirmative defenses and in refusing to hear testimony at the trial in support of such defenses. It appears to us that, to state the case as we have done above, is its own argument to the extent of showing that the judgment must at least be reversed. It seems manifest that it was error to sustain a general demurrer to an answer in a foreclosure case which alleged that the mortgage had been in fact fully paid and satisfied, and that the attempted foreclosure of such satisfied mortgage was being maintained as the result of a fraudulent conspiracy to eliminate other valid liens against a part of the mortgaged property. It was equally erroneous to refuse the admission of testimony in support of

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such allegations. The argument is made by the respondent that the allegations are too general and in the nature of conclusions, but we think this argument is not well taken. Sufficient facts were stated to withstand a general demurrer and also to call for the admission of testimony.

Another question involved in the overruling of the demurrers and in the refusal of testimony in support of the answers is important. It is the contention of the appellants that neither the mortgagee nor his assignee could release a part of the mortgaged land and throw the whole burden upon the remaining part, in view of the fact that the holder of the mortgage knew that the remaining part had been sold for the satisfaction of valid liens which had attached subsequent to the mortgage. This contention of the appellants is well sustained by the authorities. It will be remembered that the answers in the case at bar alleged that the value of the released property has at all times been \$4,000; that the sum paid upon the mortgage debt was \$550, leaving a balance due thereon of \$1,682.47, while the unreleased property, which was alone subject to appellants' junior liens, was worth but \$1,250. Under such circumstances, the mortgagee having actual notice and knowledge of subsequent liens against a part of the mortgaged property when he released a part not affected by the junior liens, thereby releases and discharges those parcels which are subsequently liable, to the following effect and extent:

"If the value of the parcel released equals the mortgage debt, then all the subsequent parcels are wholly relieved from liability; if the value is less than the mortgage debt, the subsequent parcels can, at most, be liable in their order, only for the excess of the debt over such value." 3 Pomeroy, Equity Jurisp. (2d ed.), § 1226.

The rule is also stated as follows, in 2 Jones on Mortgages (6th ed.), § 1631:

"If the mortgagee, having notice of successive alienations of parts of the mortgaged premises, has released a part which

is primarily liable for the payment of the debt, he cannot charge the other portions of the premises with the payment of it without first deducting the value of the part released, and he must make this deduction before proceeding to sell the other portions. If that value equals the entire debt, he must bear the loss, as he cannot then resort to the first lot sold; if it is equal to a part of the debt only, he may resort to the lot sold for the deficiency."

Many decisions are cited by the above textwriters which support their epitomized statements of the rule. In *Iglehart v. Crane & Wesson*, 42 Ill. 261, the court said:

"From this rule as to the order in which mortgaged premises are to be charged, it follows as a corollary that, if the mortgagee, with actual notice of the facts, releases from the mortgage that portion of the premises primarily liable, he thereby releases *pro tanto*, the portion secondarily liable. When the mortgage is sought to be enforced against the owner of the latter, he can claim an abatement of his liability to the extent of the value of that portion which should have made the primary fund."

See, also, *Johnson v. Olcott*, 8 N. J. Eq., 561; *Blair v. Ward*, 10 N. J. Eq. 119; *Deuster v. McCamus*, 14 Wis. 333; *Guion v. Knapp*, 6 Paige Ch. 35, 29 Am. Dec. 741.

The respondent argues that the allegations as to notice are insufficient. The courts generally hold that the mere record of subsequent conveyances or liens affecting mortgaged land is not sufficient of itself to charge the prior mortgagee with notice of the existence of the equities in favor of such subsequent holders; but that the mortgagee must have actual knowledge thereof. Certainly a mortgagee who has knowledge in fact may not proceed with indifference to the rights of others to release property, and then rely upon the excuse that the subsequent holders did not give him mere formal notice of their rights. Such a rule would do violence to good conscience and would bring reproach upon a court of equity as a tribunal of conscience. The essence of this matter

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of notice or knowledge on the part of a mortgagee is well stated in *Guion v. Knapp*, *supra*, as follows:

"The right to have the lands, which have been sold by the mortgagor, charged in the inverse order of their alienation, is not strictly a legal but an equitable right, and is governed by those equitable principles upon which this court protects the rights of sureties, or those who are standing in the situation of sureties. And the conscience of the party who holds the incumbrance is not affected, unless he is informed of the existence of the facts upon which this equitable right depends; or he has a sufficient notice of the probable existence of the right to make it his duty to inquire, for the purpose of ascertaining whether such equitable right does in fact exist."

The allegations of appellants' answers are that respondent had full and actual knowledge of the subsequent attachments and judgments and of the sales thereunder. Such is sufficiently the averment of a fact to withstand a general demurrer and to authorize the introduction of proof. Greater particularity of averment would practically amount to a pleading of the evidence, and if more specific statement were desired it could not properly have been effected by demurrer, but rather by motion if respondent was entitled to more definite statement. The sufficiency of the proof to establish actual knowledge must be determined after it has been introduced.

The judgment is therefore reversed, and the cause remanded with instructions to vacate the judgment and overrule the demurrers to the answers.

FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7230. Decided August 22, 1908.]

ROBERT A. MITCHELL *et al.*, *Appellants*, v. JOHN
LIDGERWOOD *et al.*, *Interveners*, *Respondents*,
H. L. MOODY *et al.*, *Defendants*.¹

CANCELLATION OF INSTRUMENTS—DURESS—ANSWER—DEFENSES. In an action to set aside a conveyance on the ground of fraud and duress, an answer alleging a voluntary sale upon full consideration without fraud or duress states a good defense.

APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. Errors in the admission of evidence in a case tried by the court without a jury are without prejudice where there was sufficient competent evidence to sustain the findings.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered June 28, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to set aside a conveyance of real property. Affirmed.

Salisbury & Kinsell, for appellants.

Davis & Davis, for respondents.

HADLEY, C. J.—This is an action to set aside a certain conveyance of real estate, on the alleged ground that the deed was procured through fraud and duress. The fee simple title to the land was in the plaintiff Robert A. Mitchell, but it was heavily incumbered with mortgages. Among others who held mortgages, was the defendant H. L. Moody. The latter also held a chattel mortgage upon crops growing upon the land. The complaint alleges that Moody caused the arrest of the plaintiff Robert A. Mitchell on the charge that the latter had sold the mortgaged crops without Moody's consent. It is further alleged that, while Mitchell was under arrest, Moody requested him to sign a deed conveying all of said

¹Reported in 97 Pac. 61.

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real estate to Moody; that Moody informed Mitchell that, in consideration of the execution of the deed, he would have the charge against Mitchell dismissed, causing him to be released from custody, and would also pay to Mitchell \$200 cash; but that if the latter would not sign the deed, then Moody would keep him in jail until he should do so; that Mitchell and his wife, the co-plaintiff herein, believing that Moody could do as he threatened, and being in great fear because of the arrest and imprisonment, executed the deed as requested by Moody. It is alleged that the \$200 was paid, but that Mitchell was not discharged from custody. The value of the land conveyed is fixed in the complaint at \$17,000. The allegations as to fraud and duress and promises to Mitchell of release from custody are all denied by Moody. The answer also alleges that the total incumbrances upon the land amounted to \$14,407.12, which sum was assumed by Moody as a part of the consideration for the conveyance to him, and that said sum, together with the \$200 paid Mitchell, was the full value of the land. It was also alleged that Moody bought the land and crops at the request of Mitchell, through the latter's attorney, upon terms voluntarily accepted by Mitchell. Prior to the trial, Moody and wife had contracted to convey a part of the land to John and Elmira Lidgerwood, and by intervention they were permitted to become parties defendant for the purpose of having their interest in the land protected. The cause was tried by the court without a jury, and the court entered findings of facts and conclusions of law upon which the judgment was rendered.

The essential facts found by the court, briefly stated, are as follows: Prior to and at the time of the conveyance, Moody held mortgages upon the land aggregating \$8,000, with \$373.34 accrued interest. He also held a chattel mortgage upon the crop for the year 1906 in the sum of \$141.85. Mitchell sold a portion of the mortgaged crop without Moody's consent, and Moody caused his arrest therefor on complaint

filed before a justice of the peace. On the evening of the arrest, Mitchell called Moody over the telephone and asked why he had been arrested, and afterwards Mitchell instructed his attorney, J. W. Graves, to go to Moody and ascertain what, if anything, Moody would give him for his equity in the land, including the crops thereon. Graves called upon Moody and arranged for a sale of the equity and crops for \$200, and on the next day the \$200 was paid to Graves by Moody, and a warranty deed from Mitchell and wife conveying the land and crops to Moody was delivered to the latter by Graves. The warranty was subject to mortgages aggregating \$5,641.85 and interest, which were then liens upon the land and not a part of the \$8,000 and more of mortgages already held by Moody. During the entire transactions from and after the arrest, Moody had no talk with Mitchell except over the telephone as before stated, and did not see him at all. In the talk over the telephone, Moody made no threats, and he did not at any time make any threats or use any duress or force in obtaining the deed from Mitchell and wife. The deed was executed and delivered voluntarily. The negotiations leading up to its execution were initiated by Mitchell, and the entire sale of the land and crops was effected, so far as Moody was concerned, by negotiations with Graves as attorney for Mitchell. The equity of Mitchell in the land and crops was of the value of about \$200. The arrest of Mitchell was a lawful one for a just cause, and was not obtained by Moody for an unlawful purpose. The interveners purchased a part of the land without any notice of any claim against the same by the Mitchells. From the foregoing facts, the court concluded that the interveners are entitled to protection in their contract for the purchase of a part of the property, and that the defendants Moody are entitled to judgment against the plaintiffs for their costs. Judgment was entered accordingly, and this appeal is in behalf of the plaintiffs.

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It is first assigned that the court erred in overruling appellants' motion against respondents' answer. The motion was to strike parts of the answer, on the asserted ground that certain allegations were inconsistent, redundant, and uncertain. We think the points are not well taken, and we regard them of such minor importance that we believe no useful purpose would be served by using the necessary space to discuss them.

It is next urged that it was error to overrule appellants' demurrer to the answer. The argument is that the answer does not state a defense to the cause of action stated in the complaint. Other discussion of this point is not required here, except to refer to the foregoing statement of the issues as joined by the allegations of the complaint, and such allegations in the answer as we have hereinbefore indicated. The latter allegations clearly state a defense to appellants' cause of action, and it was therefore right to overrule the demurrer to the answer.

A number of errors are assigned on the introduction of testimony. Much space would be required to discuss all these in detail, and inasmuch as the cause was tried by the court without a jury, we do not find error sufficiently prejudicial in its character to affect the result. There was sufficient evidence of unquestioned standing to authorize the result reached, if the court believed it and adopted it.

A number of the court's findings are attacked. We have read and considered all the testimony and, inasmuch as we find ample competent evidence to sustain all the findings, we shall not disturb them.

The judgment in all respects properly followed from the findings, and it is affirmed.

FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7289. Decided August 22, 1908.]

W. P. TOWNSEND *et al.*, *Appellants*, v. SIG. DILSHEIMER *et al.*,
Respondents.¹

PRINCIPAL AND AGENT—EMPLOYMENT—VENDOR AND PURCHASER—FRAUD—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show that the plaintiffs, the vendors in a written contract of sale of mining claims for \$10,200, had employed the defendants to act as their agents in effecting a sale for \$10,000, agreeing to pay a commission, and that they were induced through fraud to execute the contract to one of the defendants to enable them to negotiate a sale, when the agents in fact were making a sale for \$60,000, where it appears that the contract was an unambiguous one to sell the property to one of the defendants within two years upon the payment of installments, and there were no circumstances justifying an inference that the real agreement differed from the writing, which must accordingly conclude the parties; and the fact that in about a year the vendee in the contract was enabled to make a sale of the claims, with others, for \$60,000 is immaterial.

Appeal from a judgment of the superior court for Stevens county, Chapman, J., entered November 29, 1907, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for an accounting and the appointment of a receiver. Affirmed.

Slater & Allen, for appellants.

Voorhees & Voorhees, W. H. Jackson and Wakefield & Witherspoon, for respondents.

HADLEY, C. J.—This action was originally brought by Townsend, Reynolds, and Wingham, against Dilsheimer and Ehrlich, to recover what the plaintiffs claim is their proportionate share of \$60,000 as the proceeds of the sale of certain mining claims located in Stevens county, Washington. Dilsheimer was a part owner of the claims with the plaintiffs, and with two others, Talbott and Wurzburg. Afterwards Talbott, Wurzburg, and the British Columbia Copper Com-

¹Reported in 97 Pac. 53.

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pany, Limited, were brought into the case as parties defendant. It is alleged that the plaintiffs were wholly ignorant of the market or actual value of the property and had no knowledge thereof, except such as they obtained from Dilsheimer and Ehrlich; that the latter were well acquainted with the property, and from personal examination thereof well knew its actual and market value; that Dilsheimer and Ehrlich, knowing of the ignorance of the plaintiffs as to the actual value of the property and relying thereon and knowing that the claims were of the value of \$60,000 and could be sold for that sum, conspired together to cheat and defraud the plaintiffs of a large portion of their interests in their property; that in pursuance of such conspiracy they represented to the plaintiffs that they could procure a purchaser for \$10,000, which sum was all the property was worth and all that could be obtained for it; that the statement was made for the purpose of inducing the plaintiffs to employ Dilsheimer and Ehrlich as their agents with authority to sell the claims for \$10,000; that relying upon these statements, the plaintiffs did employ Dilsheimer and Ehrlich as their agents to procure a purchaser for \$10,000, and promised to pay their said agents a commission for making a sale at that price; that Ehrlich was in the employ of P. Burns & Co., of Nelson, B. C.; that he and Dilsheimer represented to the plaintiffs that, in order to facilitate the consummation of the sale, the owners should enter into a written agreement, giving Ehrlich authority to transfer the property; that such an agreement was made, and Dilsheimer and Ehrlich represented that P. Burns & Co. were the purchasers; that thereafter by different payments the plaintiffs received and accepted their respective shares of \$10,000 in cash as the selling price of the claims; that in fact no sale was ever made to P. Burns & Co., but that a sale was made to the British Columbia Copper Company, Limited, at the price of \$60,000, which sale the plaintiffs are willing to approve and confirm, provided they receive their share of the

proceeds thereof. The appointment of a receiver for the property is asked and an accounting is demanded. The defendants Talbott and Wurzburg answered the complaint, admitting its allegations, and by way of cross-complaint they asked for themselves the same character of relief which the plaintiffs demanded in their complaint. Dilsheimer, Ehrlich and the copper company answered separately, each denying the material allegations of the complaint and cross-complaint. The cause was tried by the court without a jury, and resulted in a judgment dismissing both the complaint and cross-complaint. The plaintiffs and the cross-complainants Talbott and Wurzburg have appealed.

The errors assigned are that the court erred in dismissing the second amended complaint and the cross-complaint, and in rendering judgment against appellants. These assignments necessarily involve the whole evidence. We have read the record of the testimony, which is quite extensive, and we are satisfied that the judgment of the court is sustained thereby. The appellants, together with Dilsheimer, as owners of the claims, executed a written agreement to transfer two claims, the Napoleon and Bonaparte, to Ehrlich for \$10,200. Two hundred dollars was paid at the time of the agreement, and it was provided that that sum should be used for the assessment work upon the claims, which was done. The balance of \$10,000 was to be paid as follows: \$2,500 in one year, \$2,500 in eighteen months, and \$5,000 in two years. The payments were all made from time to time, were accepted by the several owners, and the transfer was made. The written agreement was made with Ehrlich as an individual transferee, and not with him as agent for the owners sustaining a fiduciary relation to them, as alleged in the complaint and cross-complaint. The written agreement to transfer to Ehrlich is plain and unambiguous in all its terms. It was signed by each of the appellants in person. They were all fully apprised of its contents. No circumstances appear which jus-

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tify evidence that the real agreement was different from that expressed in the writing. The rights of the parties must, therefore, be determined by the written agreement. The fact, if it were true, that nearly a year after this agreement Ehrlich was able to sell the property to the British Columbia Copper Company, Limited, for \$60,000 is not material to the appellants, who sold and received the price for which they at the time deliberately bargained. The evidence, however, shows that several other claims were included in the deal with the copper company which were not comprised in the transfer from appellants to Ehrlich. This may to some extent account for the larger selling price in the sale to the copper company. Appellants, however, urge that the additional claims were of little value. The evidence is in sharp conflict upon that subject. There was expert testimony to the effect that the additional claims are probably of much value, for the reason that it is believed that the veins of the Napoleon and Bonaparte claims dip without the side lines of those claims and cross into the others.

Upon the whole record of the evidence, we believe the judgment is right, and it is affirmed.

ROOT, CROW, and MOUNT, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

[No. 7280. Decided September 2, 1908.]

B. R. KOLBE, *Appellant*, v. MARY KOLBE, *Respondent*.¹

DIVORCE—DIVISION OF PROPERTY. Upon awarding a divorce to a husband on the ground of abandonment, the husband is liberally provided for in the division of the property, having regard to the respective merits of the parties, their condition, and the party through whom the property was acquired, as required by Bal. Code, § 5723, where it appears that at the time of their marriage, he was a young man in good health, able to work and worth \$2,000, while the wife was considerably older and possessed of an estate worth \$70,000; that she provided all his living expenses for five years, while he did nothing but look after investments, and the parties having separated, the husband was awarded an estate valued at \$23,000 and the wife an estate valued at \$92,000.

Appeal by plaintiff from a judgment of the superior court for King county, Joiner, J., entered November 1, 1907, upon findings by the court, after a trial on the merits before the court without a jury in consolidated actions, awarding a divorce to the plaintiff and making a division of the property in favor of the defendant. Affirmed.

Blaine, Tucker & Hyland, for appellant.

Bausman & Kelleher, for respondent.

Crow, J.—Mary Kolbe, as plaintiff, commenced in the superior court of King county an action (No. 53549) against B. R. Kolbe, her husband, to quiet title to certain real estate which she claimed to be her separate property. Afterwards B. R. Kolbe, as plaintiff, commenced an action (No. 58148) against his wife Mary Kolbe, for a divorce, in which he asked that the rights of the respective parties to the same real estate be adjudged, and that, upon the granting of a decree of divorce, an equitable division thereof be made. By stipulation these actions were consolidated. On their trial, one

¹Reported in 97 Pac. 236.

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decree was entered, granting a divorce to the husband on the ground of abandonment, and dividing the property. The husband B. R. Kolbe, being dissatisfied with the disposition of the property, has appealed from that portion of the decree.

In her action (No. 58549) respondent, Mary Kolbe, alleged her marriage to appellant in 1901; that prior thereto she had inherited, from her former husband in the state of Illinois, an estate of the appraised value of \$100,000, of which she was seized at the date of her subsequent marriage to appellant; that reposing confidence in appellant, she had from time to time commissioned him to purchase real property for her in the city of Seattle and elsewhere; that in negotiating such purchases he caused a portion of the titles to be conveyed to respondent, a portion to respondent and appellant, and a portion to appellant alone; that he caused the deeds to himself to be so executed for the purpose of defrauding her out of her separate property rights; that he did so without her knowledge or consent; that he had kept her in ignorance of his actions in that regard, and that she was entitled to have all of such real estate adjudged and decreed to be her separate property. In the complaint in cause No. 58148 the appellant, after pleading an abandonment of himself by his wife, alleged that at the time of his marriage she had a separate estate valued at \$100,000; that he was then possessed of about \$3,000; that immediately preceding their marriage it was agreed between them, in consideration of such contemplated marriage, that he should handle and invest her money so as not to impair her capital; that all profits therefrom should become his separate property; that after their marriage they removed from the state of Illinois to the state of Washington, where a subsequent agreement was made, whereby appellant released and surrendered his right to invest and handle all of respondent's property; that in consideration thereof respondent agreed to advance money to appellant from time to time in an amount not to exceed \$30,000, for investment in real estate which should become

appellant's separate property; that, in pursuance of such agreement, respondent advanced about \$27,000, which appellant invested in certain real estate described in his complaint; that he also invested \$1,600 of his own funds in the same real estate; that he had contributed all his time and attention for the period of five years, from the date of their marriage until their separation in 1906, to making and caring for such investments; that the respondent, Mary Kolbe, claimed the real estate so purchased to be her separate property, but that a large portion of it was his separate property.

The principal issue as to the real estate purchased was whether it was community property, the separate property of Mary Kolbe, or in part the separate property of B. R. Kolbe. The trial judge found that Mary Kolbe had from time to time advanced \$38,840 in cash to appellant; that he had used \$30,000 in purchasing various tracts of real estate mentioned in the pleadings; that the property so purchased had advanced \$30,000 in value; that it was the separate property of Mary Kolbe; that after a separation of the parties, which occurred in 1906, B. R. Kolbe had acquired in his own name, spelled inversely, and describing himself as a bachelor (but with funds in which some money possessed by him before his marriage was intermingled with money belonging to the wife), certain tracts of land in King county, which became community property; that the value of such community property so purchased by the appellant subsequent to the separation was \$3,000, and that no agreement was made by Mary Kolbe, either before or after her marriage to appellant, that any portion of her separate property should be invested by, and become the separate property of, her husband. Upon these and other findings not necessary to be here repeated, but all of which are sustained by the evidence, the trial judge granted the appellant B. R. Kolbe a decree of divorce, and awarded him real estate in King, Chehalis, and Jefferson counties, the total value of which, according to his own evi-

dence, was approximately \$23,000. The remainder of all the property, both real estate and personal, of the total value of \$92,000, was awarded to respondent.

Appellant first contends that the trial judge erred in finding and holding that the property purchased by him with funds advanced by his wife Mary Kolbe was her separate estate. We think this finding was sustained by the clear preponderance of the evidence. Appellant's principal contention is that a just and equitable division of the property has not been made. It is in support of this contention that he insists that a large portion of the real estate, purchased by him under his agreement with his wife, became his separate property. He also insists that he gave his entire time and attention for the period of five years to an investigation of real estate values, to making investments, and to caring for the same, and that he is entitled to a greater allowance than has been awarded to him by the trial judge. The evidence shows that, at the time of his marriage, which occurred in 1901, he was about thirty years of age, and possessed of about \$2,000 in cash; that the respondent was then a widow, about fifteen years his senior; that she had a family of six or seven children; that appellant and respondent have no children; that respondent was possessed of an estate which she had inherited from her former husband, at a valuation of \$100,000, but that its actual value was only \$70,000; that since his marriage appellant has earned only \$800 as the result of his individual work; that aside from making investments for his wife, he has engaged in no occupation or employment; that he has been supported by respondent, she paying all living expenses, and that aside from a small portion of the \$800 earned by him, and his services in making investments, he has contributed nothing whatever to the support of respondent or her family. As shown by appellant's own evidence, the real estate awarded to him is of the value of \$23,000, while that awarded to respondent is of the value

of \$71,000. True, the evidence further shows that respondent holds as separate personal property cash and securities to the value of \$21,000, which were also awarded to her, making her a total apportionment of about \$92,000, based on appellant's valuation.

Bal. Code, § 5723 (P. C. § 4637), provides that,

"In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired,"

This section fixes no arbitrary rule to be followed in making a disposition of property in an action for divorce. Under its terms the method of division to be adopted must in each case rest within the sound discretion of the trial judge, who sees the parties, hears them testify, and is in a favorable position for observing and understanding their respective merits and needs. This court will not, upon review, interfere with a disposition of property in such an action unless it manifestly appears, from the entire record, that injustice has been done, or that the trial court has abused its discretion. After a careful examination of all the evidence, we are unable to conclude that any injustice has been done to appellant, or that the trial judge has abused his discretion in this action. When appellant married respondent, he was a young man of excellent education, of good health, able to work, and had about \$2,000 in cash, while the respondent was seized of an estate of the value of \$70,000. As a result of the decree of the trial court, he is now awarded an estate of the value of \$23,000, while the respondent, who has for five years provided all his living expenses, is awarded an estate of the value of \$92,000, and these values are based on appellant's evidence. Considering the respective merits of the parties, the condition in which they are left, and the party through whom

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the property was originally acquired, we fail to see how the appellant has any just cause of complaint. From our view of the evidence and all the circumstances, we conclude that the trial judge has provided for the appellant in a most liberal manner.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, and DUNBAR, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 7224. Decided September 12, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. G. M.

FLETCHER, *Appellant*.¹

INDICTMENT AND INFORMATION—TIME FOR FILING—EXCUSE FOR DELAY. The accused is not entitled to a dismissal of the charge for failure of the prosecuting attorney to file the information within thirty days, where the delay was requested by counsel authorized to represent the accused, such being a sufficient excuse, within Bal. Code, § 3276 and within the rule that the burden of showing good cause rests upon the prosecuting attorney.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered April 7, 1906, refusing a discharge in habeas corpus, after a hearing on the merits. Affirmed.

S. S. Bassett and *John C. Kleber*, for appellant.

R. M. Barnhart and *A. J. Laughon*, for respondent.

MOUNT, J.—This appeal is from an order of the lower court denying appellant's application for discharge upon a writ of *habeas corpus*. It appears that the appellant was charged with the crime of embezzlement, before a justice of the peace in Spokane county. On February 21, 1906, the

¹Reported in 97 Pac. 242.

appellant waived a preliminary examination and was bound over to appear before the superior court of that county. No information was filed against him within thirty days, and on April 14, 1906, appellant applied to the superior court for release upon *habeas corpus* for that reason. For return to the writ it was shown that an information had not been filed because counsel who at that time was representing appellant had, with the knowledge and consent of appellant, requested the prosecuting attorney not to do so, because the charge might be disposed of without a trial, and that the prosecuting attorney upon these representations had granted the request, and had not filed the information. On this return being made, the court treated the application for the writ as a motion to dismiss, and after hearing evidence orally and by way of affidavits, denied the application, but required the prosecuting attorney to file an information on or before April 9, 1906, charging appellant with the crime named. Afterwards the information was filed, and the appellant was tried and convicted of the charge, and sentenced to a term in the penitentiary.

The only question presented here is whether the court erred in refusing to discharge the appellant. The statute, Pierce's Code, § 1530 (Bal. Code, § 3276), provides:

"When a person has been held to answer, if an indictment be not found or information filed against him within thirty days, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown."

The burden of showing good cause rests upon the prosecuting attorney. *State v. Lewis*, 35 Wash. 261, 77 Pac. 198; *State v. Seright*, 48 Wash. 307, 93 Pac. 521. In the last-named case we said:

"But a dismissal under such circumstances does not operate as a bar to another prosecution for the same offense, nor would a discharge compel the prosecuting officer to commence anew, before a committing magistrate. On the contrary, the

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prosecuting attorney may file such an information in the court before which he was bound over to appear, at once upon the dismissal of the original proceeding, without violating any of the accused's rights."

In view of this rule, it is not apparent how the appellant has been aggrieved, even if the court erred in refusing to dismiss the action. We think, however, that the court did not err in refusing to discharge the appellant. It appeared that the prosecuting attorney had not filed the information because he was requested not to do so by an attorney, Mr. Brooks, who at that time was acting for the appellant in good faith and with the knowledge of the appellant. The authority of Mr. Brooks is questioned, but there is ample evidence to show that he was acting on behalf of the appellant and with appellant's knowledge and in entire good faith. The cause shown was therefore sufficient.

The order appealed from must be affirmed, and it is so ordered.

HADLEY, C. J., ROOT, and CROW, JJ., concur.

RUDDIN and FULLERTON, JJ., took no part.

[No. 7238. Decided September 12, 1908.]

THOMAS M. TAYLOR, *Appellant*, v. WASHINGTON MILL
COMPANY *et al.*, *Respondents*.¹

MASTER AND SERVANT—NEGLIGENCE OF MASTER—SAFE PLACE—FALL OF CHISEL. There is no negligence shown on the part of a master, and a nonsuit is properly granted, where it appears that a servant, engaged in washing the floor of a reservoir while carpenters overhead were shingling the roof, was injured by the fall of a chisel used by them in their work in the ordinary and usual way, using ordinary tools, all of which was familiar to the plaintiff, that the chisel was shaken and dropped down after being stuck in the roof, and there was no evidence that such was not the usual and a reasonably safe place for it.

SAME—FELLOW SERVANTS—DIFFERENT DEPARTMENTS. A servant employed in washing the floor of a reservoir, and carpenters engaged in shingling the roof of the reservoir, then in the course of construction, are fellow servants, and the defendant is not liable for an injury to the former by reason of the negligence of the latter in allowing a chisel to fall, where the injured servant knew that the carpenters were at work overhead using ordinary tools in the usual and ordinary way, although they were working under the direction of a different foreman.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered November 5, 1907, in favor of the defendant upon granting a nonsuit. Affirmed.

Blaine, Tucker & Hyland, for appellant.

Roberts & Hulbert, for respondents.

MOUNT, J.—Action for personal injuries. At the trial of the case below, after the plaintiff had introduced all his evidence, the court granted the defendants motion for a nonsuit, and dismissed the action. The plaintiff appeals.

The facts are that the respondent Washington Mill Company is a corporation engaged in manufacturing lumber. Its mill was under control of a general superintendent, named E. P. Blake, and under him were foremen of gangs or crews

¹Reported in 97 Pac. 243.

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of men. In connection with the mill was a carpenter shop where several men were employed under a foreman. There was also a machine shop where a number of men were employed under another foreman. The plaintiff, on May 7th, 1907, was employed in the machine shop, sweeping, threading nuts, and tapping bolts. On that day the respondent corporation was constructing a reservoir which was about completed. Two carpenters, one of whom was the respondent Nansen, were at work placing shingles on a cone-shaped roof. This roof was about twenty-two feet high above the bottom of the reservoir. It was about three-fourths completed. The shingling was being done in the ordinary way with ordinary tools, one of which was a two-inch chisel, used by Nansen for the purpose of cutting off the edge of shingles.

On the date above stated, the plaintiff was directed by his foreman to wash the floor of the reservoir. He proceeded to do so. But when he got into the reservoir he found that he could not remove a plug from the hole in the center of the floor. He thereupon asked the advice of the carpenters upon the roof as to what he should do. They advised him to get a brace and bit and bore the plug out. He got the brace and bit, and while he was in the act of removing the plug, the chisel used by Nansen fell from the roof and struck the plaintiff on the back and injured him. Mr. Nansen testified that, when he was not using the chisel, he stuck it in the roof "between the sheeting and the rafters;" that while "moving around the roof was shaken and the chisel dropped down." The appellant was well acquainted with the carpenters on the roof, knew how they did their work, and the tools they had, and knew they were above him on the roof. It was shown by the plaintiff himself that the carpenters were doing their work in the usual and ordinary way, using the ordinary tools, and that he was familiar therewith. The negligence alleged was,

"That the said defendant Mill Company, during all the times herein mentioned, failed and neglected to provide for

the plaintiff a suitable, proper or safe place in which to work, for the reason that spaces were left in the roof of said building and Nansen, the defendant hereinbefore mentioned, and other carpenters were working upon said roof and using in their employment the said large chisel above described, and no proper or suitable place was made for the said chisel, so that the same could not be shaken when the carpenters were moving around or hammering."

There was no evidence that the construction of the roof was not the usual ordinary construction of such structures, or that the place in which the chisel was kept was not reasonably safe and not the one usually adopted and used. On the other hand, the plaintiff himself testified that he was familiar with shingling upon roofs, and that the carpenter in this instance used the ordinary tools in the ordinary way. There is, therefore, no proof of any negligence of the respondent company.

Counsel for appellant argue that the carpenters on the roof and the appellant were not fellow servants, by reason of the fact that the carpenters were under the direction of one foreman while the appellant was under the direction of another foreman. They rely wholly upon the case *Hammarberg v. St. Paul, etc. Lumber Co.*, 19 Wash. 537, 53 Pac. 727. But in that case the person who left a chisel on the crossbeam was a millwright whose duty it was to keep the mill in repair, and who was employed to make and keep the mill reasonably safe, and it was for that reason held that the millwright represented the master and was a vice principal. In the case at bar, the carpenters were in no sense vice principals, they were clearly fellow servants with the appellant, all working for the common master in the construction of the reservoir with opportunity to see and know what the other was doing. It is true the appellant was not doing carpenter work but he was none the less a fellow servant with the carpenters the same as a plasterer, a plumber, or a painter would be a fellow servant with carpenters working upon the

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same building for a common employer. There is no contention that the place where the appellant was sent to work was not reasonably safe except for the fact that the workmen above were liable to fall or drop something down upon him. "As to such danger the law only requires reasonable care to employ competent men and provide suitable material. . . . The employee is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly." *Smith v. Hecla Mining Co.*, 38 Wash. 454, 80 Pac. 779. It is not the duty of an employer to follow his employees around in order to protect them from situations made dangerous by unusual occurrences, unexpected and not to be anticipated by either the master or the servant, which was clearly the case here.

We think the lower court properly granted the motion for nonsuit, and the judgment must therefore be affirmed.

HADLEY, C. J., ROOT, CROW, and FULLERTON, JJ., concur.

[No. 7292. Decided September 12, 1908.]

L. M. HARTLEY, *Respondent*, v. FLOYD FURGESON *et al.*,
Appellants.¹

SALES—WARRANTY—EVIDENCE—SUFFICIENCY. There is not sufficient evidence that the sale of a stallion was upon a warranty that he would get with foal sixty-five per cent of all mares bred to him, where it appears that notes and a mortgage were given for the price and a written contract was made which did not contain the warranty, and there is a direct contradiction of defendants' evidence that the contract was rescinded and \$100 returned and that later the oral warranty was substituted and the \$100 again paid, and where the defendant who claimed the horse was worthless kept the horse and used him for two seasons without complaint or offer to return him, and then sold him to one of his attorneys for \$250.

¹Reported in 97 Pac. 234.

Appeal from a judgment of the superior court for Lincoln county, Zent, J., entered October 17, 1907, in favor of the plaintiff, after a trial on the merits, in an action to foreclose a mortgage. Affirmed.

Martin & Wilson, for appellants.

Dye & Reiter and McCoid & Finley, for respondent.

MOUNT, J.—This action was brought by the respondent to foreclose a mortgage upon certain real estate. After issues were made and a trial had thereon, a decree was entered as prayed for in the complaint. The defendants have appealed from that decree.

At the trial it was admitted that the appellants executed and delivered the notes and mortgage, but it was claimed by the appellants that the notes were given in part payment of the purchase price of a stallion; that when the sale was made the respondent, through his agent, warranted the horse to get with foal sixty-five per cent of all mares bred to him; that the warranty failed, and that the stallion was utterly worthless, and there was a total failure of consideration for the notes. The appellants also claim to have been damaged in the sum of \$1,300 by reason of the failure of the warranty.

The main question at issue upon the trial was whether the warranty as above stated was made. The evidence was in direct conflict upon this question. It was admitted that, at the time the sale was made, a written contract was entered into, executed, and delivered; but the evidence of the appellants was to the effect that, after this writing was delivered, the appellant Floyd Furgeson discovered that the warranty, as stated above, was not contained in the writing; that thereupon the written contract was rescinded by mutual agreement, and \$100 in cash paid at the time was returned, and thereupon an oral agreement was made to the effect that, if the horse with proper care failed to get with foal sixty-five per cent of all mares bred to him for a period of five years,

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the notes and mortgage were to be returned to the appellant and satisfied; that thereupon the \$100 cash was again paid by the appellant to the agent of respondent. The appellant Floyd Furgeson admitted that he kept the horse and used him from the date of the sale; namely, February 29, 1904, for two seasons and up to the time this action was begun, and made no complaint to the respondent and did not offer to return the horse, but afterwards sold him for \$250 to one of his attorneys in this action. The agent of respondent testified positively that no agreement except the written one was ever made, that there was no dissatisfaction with the written agreement and no warranty other than the one contained therein. After reading the evidence and considering the circumstances surrounding the case, we are satisfied that the respondent failed to establish the warranty alleged. The appellants argue that the court erred in rejecting certain evidence offered to show damages and that the horse was of no value. As we read the evidence, however, proof was received upon this question; but in view of the fact that the appellants failed to prove the warranty alleged, for the breach of which he claims damages, and having shown affirmatively that the horse was in fact valuable, we need not further consider this question.

There is no error in the record and the judgment must be affirmed.

HADLEY, C. J., ROOT, and FULLERTON, JJ., concur.

[No. 7311. Decided September 12, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. DAVE KING,
Appellant.¹

CRIMINAL LAW—TRIAL—DIRECTING STATEMENT OF DEFENSE. Under Bal. Code, § 4993, the accused has no option to refuse to state his defense upon the close of the plaintiff's case.

TRIAL—MISCONDUCT OF COURT—COMMENTS. It is not unlawful comment on the evidence for the court, in directing the defendant to state his defense, to say that the nature of the case is such that the jury ought to know how defendant intended to meet the state's case.

SAME—PROVINCE OF COURT AND JURY—INSTRUCTIONS—CREDIBILITY OF WITNESS. It is prejudicial error, in giving an instruction as to an alibi, to preface the same by a remark that the court did not think it necessary, where the credibility of the accused on that point was directly in issue; as the same disparages the defense and infringes upon the province of the jury.

SAME—MISLEADING INSTRUCTIONS—ALIBI—MATERIALITY OF TIME. Where the state's evidence fixed the date of an offense as being between the 12th and 15th of a certain month, and upon the defense of an alibi there was evidence that the defendant was home, sick in bed, during that period, it is misleading and error, instructing upon the subject of the alibi, to state that the exact date is immaterial and it is sufficient if the defendant committed the crime at any time within three years, etc.

SAME—APPEAL—DECISION—IMPROPER SENTENCE—NEW TRIAL. A new trial will not be ordered, where the sentence is improper, but the case will be remanded for a proper sentence.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered July 2, 1907, upon a trial and conviction of obtaining money under false representations. Reversed.

Del Cary Smith and *L. J. Birdseye*, for appellant.

R. M. Barnhart and *George A. Lee*, for respondent.

¹Reported in 97 Pac. 247.

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MOUNT, J.—The appellant was convicted of the crime of obtaining money by false and fraudulent representations. He appeals from the judgment sentencing him to an indefinite term in the penitentiary. After the state had closed its evidence, the court directed counsel for the defense to state his defense to the jury. Whereupon counsel for the defendant said, "Is not this an unusual proceeding? I thought it was optional on the part of the defense whether they made a statement or not." When the court said: "It is a matter within the discretion of the court, and I direct you to make a statement of your defense. The nature of the case is such that I think the jury ought to know how you intend to meet the state's case." Whereupon counsel, after saving an exception, stated in substance that the defense would be an alibi. The statute in reference to the manner of conducting jury trials provides:

"The plaintiff must briefly state his cause of action, and the evidence by which he expects to sustain it. The defendant may in like manner state the defense, and the evidence he expects to offer in support thereof; but nothing in the nature of comments or argument shall be allowed in opening the case. It shall be optional with the defendant whether he states his case before or after the close of the plaintiff's testimony." Bal. Code, § 4993 (P. C. § 607).

The inference here is clear that the defendant has no option after the close of plaintiff's testimony. It was not error, therefore, for the court to direct the statement. It is perhaps true that this statute is directory, and that the court and counsel may waive the provisions thereof, but certainly no prejudicial error is apparent from the fact that the court required the counsel to state what his defense would be.

"Neither party has the right to take the other by surprise by reserving the disclosure of material facts or points of law until it was too late for them to be duly weighed and examined." Wharton, Criminal Pleading and Practice (8th ed.), p. 382.

It is also claimed that the statement of the court that "the nature of the case is such that I think the jury ought to know how you intend to meet the state's case," was a comment upon the facts. We think this is not such a comment as will alone justify a reversal.

In his instructions to the jury, the court said:

"I am requested to give the jury an instruction on the matter of an alibi. I don't think it is necessary to instruct this jury on that point; however, I will explain to the jury what that means. Alibi, as it is called, is a Latin word—lawyers are very fond of using Latin words—which means 'elsewhere'—that he was somewhere else at the time the crime was committed; and it was not necessary to say to the jury that if he was not there he could not be guilty. And if he committed the crime, he was there, and if the jury have any reasonable doubts about his having been there, they should acquit him. It was not claimed that he acted through any other person. The state claims that he committed this crime in person, and of course he could not do so without being there in person. It was for the jury to determine the place and time when this offense was committed. I will say in that connection that the exact date is immaterial. It does not make any difference, so far as the crime is concerned, if the defendant committed the crime as charged at any time within a period of three years prior to the time the information was filed—that is, three years preceding the 29th day of May, 1907—it is sufficient."

Appellant contends that the remark of the court, "I don't think it was necessary to instruct the jury on that point," tended to disparage the defense in the mind of the jury. We think this criticism has merit. This remark was prompted by one of two ideas—either that the evidence tending to prove an alibi was unworthy of consideration, or that the jury already knew the legal effect of such proof. In either event, the remark was clearly reversible error, because there was evidence which tended to prove that the defendant was at his home in bed sick, when the crime was committed. It was ex-

clusively the province of the jury to consider and pass upon the credibility of this evidence, uninfluenced by the trial judge as to its credibility. There is nothing in the record to show that the jury were informed or knew the legal effect of an alibi, if proven in the case, and it was therefore the duty of the court to give to the jury the law upon the question.

The statement of the court that, "I will say in that connection that the exact date is immaterial. It does not make any difference so far as the crime is concerned if the defendant committed the crime as charged at any time within the period of three years prior to the time the information was filed," etc. was misleading and erroneous in the connection in which it was used. The witnesses for the state had fixed the date when the crime was committed as being between the 12th and 15th day of February, 1907. The defense was that the defendant was not the person who obtained the money, and that he was sick at home, unable to leave his room between those dates. The time of the commission of the crime was therefore clearly material. There are many cases where no issue is based upon the time when the crime was committed. In such cases this instruction would be correct, but was misleading and erroneous in this case because the time was definitely fixed by the state, and the defense of an alibi was based upon that time. It is difficult to imagine a case where the time of the commission of a crime is not material to the defense of alibi. Aside from these erroneous statements, the instructions appear to cover the law of the case.

It is also argued that the sentence which was imposed upon the appellant is indefinite, and was imposed under a law passed after the commission of the crime, and is for that reason void. If we were to hold that the sentence was improper the cause would not be sent back for a new trial on that account, but would be remanded for a proper judgment. *State v. Gilluly*, ante p. 1, 96 Pac. 512. It is not necessary therefore to consider this assignment further be-

cause a new trial must be had for reasons above stated.

The assignments of error which we have not noticed contain no merit and for that reason we have passed them by. The judgment appealed from is reversed for the reasons given above, and the cause is remanded for a new trial.

HADLEY, C. J., ROOT, and CROW, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

[No. 7337. Decided September 12, 1908.]

CHRIST OTTOMEIER, *Respondent*, v. A. L. HORNBERG *et al.*,
Appellants.¹

APPEAL—REVIEW—VERDICTS. A special verdict upon conflicting evidence which was ample to sustain the findings is conclusive upon appeal.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 11, 1907, upon the special verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action in tort. Affirmed.

John C. Kleber, for appellants.

Geo. A. Latimer, for respondent.

MOUNT, J.—This action was brought by the plaintiff against the defendants, to recover for damages to a team of horses, harness, and wagon. It was alleged that the damages were caused by reason of the negligent and reckless operation of an automobile by the defendants. The cause was tried to the court and a jury. On the trial the action was dismissed as to the defendant Wright. The jury returned a verdict in favor of the plaintiff for \$350, and a judgment was entered thereon against the other three defendants. The defendants A. L. and C. H. Hornburg have appealed.

¹Reported in 97 Pac. 235.

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It is argued by the appellants that they were in no way connected with or liable for the damages, because they rented the automobile to the defendant A. E. Hornburg, who is alone liable for the damages. This was one of the issues of fact tried to the jury, and special findings were submitted and made thereon by the jury as follows:

"(1) Was the defendant A. E. Hornburg, the driver of the automobile, an employee of the automobile company at the time in question? Answer: Yes. (2) Was the defendant A. E. Hornburg a lessee of the automobile he was driving, at the time in question? A. No."

There is in the record ample evidence to sustain these findings. There was conflict upon these points, and the questions were therefore questions of fact for the jury. Its findings are conclusive under such circumstances. See authorities cited in 1 Remington's Wash. Digest, pp. 223, 224.

No other errors are assigned. The judgment appears to be right, and is therefore affirmed.

HADLEY, C. J., ROOT, CROW, and FULLETON, JJ., concur.

[No. 7407. Decided September 12, 1908.]

FRANCIS H. COOK *et al.*, *Respondents*, v. H. D. SKINNER,
Appellant.¹

DEEDS—VALIDITY—PRINCIPAL AND AGENT—LIABILITY OF AGENT TO THIRD PERSON—FRAUD—MISREPRESENTATIONS. A complaint by mortgagees, who had deeded certain mortgaged premises to the mortgagee, states a cause of action for fraud in securing a conveyance of five acres of land not covered by the mortgage, where it appears that the defendant was the agent of the mortgagee, a nonresident, duly authorized to accept from the plaintiffs a deed of the mortgaged property in satisfaction of the debt, and that defendant, as such agent, without the knowledge of his principal, secured a deed from the plaintiffs to the five-acre tract, for his own use and benefit, by falsely representing that the mortgagee would not discharge the debt without such additional conveyance, and that, relying thereon, the

¹Reported in 97 Pac. 234.

plaintiffs made the deed to defendant's married daughter (who afterwards deeded to defendant) upon defendant's false representations that such third person, unknown to plaintiffs, was the person to whom the mortgagee desired conveyance made.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered November 27, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action of ejectment. Affirmed.

A. E. Barnes, for appellant.

Belt & Powell and *Graves*, *Kizer & Graves*, for respondents.

MOUNT, J.—The plaintiffs brought this action to recover about five acres of land from the defendant, on the alleged ground of fraud practiced by the defendant in acquiring title thereto from the plaintiffs. The cause was tried to a jury. Verdict was returned in favor of the plaintiffs. The defendant appeals.

The errors assigned all depend upon the sufficiency of the complaint. The facts alleged are in substance these: The respondents owned certain real estate upon which they had given two mortgages to secure an indebtedness amounting to about \$3,400. A nonresident partnership, known as Pierce, Wright & Co., was the mortgagee. The appellant was the local agent for this partnership. The mortgages were afterwards assigned to Simeon Jones, also a nonresident. When the indebtedness became due, respondents were unable to pay the same; and proposed to appellant to convey the mortgaged premises to the mortgagee in satisfaction of the debt. Appellant communicated with the mortgagee and obtained authority to take the property in satisfaction of the debt. Appellant then, with intent to cheat and defraud the respondents, falsely informed them that the mortgagee would not accept the mortgaged premises in payment of the mortgage debt unless respondents would, in addition to the mortgaged premises, convey to the mortgagee the five-acre tract of land

in question, which was not covered by the mortgages. Respondents, believing and relying upon the appellant's representations that he could not secure a satisfaction of the debt by a conveyance of the mortgaged property to the mortgagee unless the five-acre tract was included in the conveyance, and being threatened by the appellant with foreclosure and a deficiency judgment if the demand were not complied with, acceded to the appellant's demand, and at his instance and request, conveyed the mortgaged premises to Simeon Jones, to whom appellant stated the mortgages had been assigned, and also conveyed the five-acre tract to one M. B. Berry, to whom appellant stated the mortgagee had requested that it should be conveyed. Appellant's statement that the mortgagee would not accept the mortgaged premises in payment of the mortgage debt was false, and made for the purpose of cheating and defrauding the respondents out of the five acres in controversy and to secure the title thereto for himself. The mortgagee knew nothing of the conveyance of the land to M. B. Berry, and reaped no benefit therefrom. M. B. Berry was appellant's married daughter, and unknown to the respondents at the time; and the conveyance of the five-acre tract was made to her, not at the instance or request of the mortgagee or for his benefit, but at appellant's instance and for his sole benefit and use as a part of his scheme for acquiring title to the land and to conceal his fraud and deception. Afterwards M. B. Berry conveyed the land to appellant.

We think this complaint states a cause of action in favor of the respondents. It is conceded that these facts would state a cause of action against the appellant in favor of Simeon Jones, the assignee of the mortgagee, for the reason that the appellant was an agent of Simeon Jones, and "that the agent will not be allowed to make a profit out of the agency or deal in the business thereof for his own profit, but must give the principal the benefit of any advantage he may obtain." But it is claimed by appellant that the respondents

and appellant were dealing at arm's length. It is probable that the appellant was not acting as agent of the respondents when he assumed to obtain the terms upon which he could be authorized to deal with the respondents, and it is also probable that he was not bound to state the terms upon which he was authorized to act; but when he undertook to state these terms to the respondents, he should have stated them truthfully. When he misstated his authority, he was guilty of fraud, because respondents had no means of knowing the truth and were required to rely upon his statements. The fact that his misrepresentations were relied upon by the respondents, and were unknown to the mortgagee, does not aid the appellant's title, which was acquired by fraud perpetrated against both his principal and the respondents. If the mortgagee had authorized appellant to obtain all he could get in satisfaction of the mortgage debt, then the respondents, after having conveyed the land which they did convey, would have had no complaint where the mortgagee was fully informed. But if, as alleged in the complaint, the mortgagee authorized the appellant to accept the mortgaged premises in satisfaction of the debt, that was the extent of appellant's authority, and as agent he was not authorized to misstate his authority and take the five-acre tract in question in his own right and hold it as against the respondents. In other words, he was not authorized to commit a fraud upon the respondents simply because it was within his power to do so.

There is some contention that the evidence is not sufficient to sustain the complaint. We think it is sufficient for that purpose. The question of the statute of limitations was for the jury under the facts. It is not claimed that the case was not fairly or properly tried to the jury. We find no error in the record, and the judgment must therefore be affirmed.

HADLEY, C. J., ROOT, and CROW, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

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Opinion Per Root, J.

[No. 7245. Decided September 15, 1908.]

THE STATE OF WASHINGTON, *Appellant*, v. MARION C.
STRANGE, *Respondent*.¹

INDICTMENT AND INFORMATION — OBJECTIONS — WAIVER BY PLEA.
Entry of a plea of not guilty waives the right to object to an information on the ground that it was filed while a grand jury was in session.

SAME—TIME FOR FILING—SESSION OF GRAND JURY. Bal. Code, § 6802, providing that an information may be filed when the grand jury is not in session, refers to actual sessions, and does not preclude the filing of an information during the interval of a specified adjournment of the grand jury.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered November 29, 1907, upon a trial and conviction of the offense of family desertion. Affirmed.

R. H. Kipp and *J. L. Wallace*, for appellant.

R. J. Neergaard and *McCroskey & Canfield*, for respondent.

ROOT, J.—On the 29th day of October, 1907, the prosecuting attorney of Whitman county filed an information against respondent, charging him with the crime of family desertion. A grand jury had been convened by order of the court, on the 21st day of October, 1907, and after continuing at labor until the 26th of October, adjourned until November 4, 1907, the information having been filed as aforesaid during the interval of this adjournment. The respondent was arraigned on the 4th of November, entered a plea of not guilty at that time, and appeared for trial on the 29th day of November, 1907. No demurrer or motion of any kind was interposed as against the information until the case was

¹Reported in 97 Pac. 233.

called for trial and a jury had been empaneled and sworn to try the case. Then respondent objected to proceeding further, on the ground that the prosecuting attorney had no authority to file an information at the time when this information was filed, claiming that, in contemplation of law, the grand jury was then in session. The plea of "not guilty" was not withdrawn. The trial court sustained the objection and dismissed the action. From this judgment of dismissal, the state appeals.

It is the appellant's contention that the respondent waived his right to demur, to quash, or set aside the information, and any objection he may have had to the filing of the information by the prosecuting attorney, when he entered his plea of not guilty instead of interposing such demurrer, motion, or objection. Appellant further contends that, at the time this information was filed, the grand jury was not in session within the meaning of the statute which limits the time wherein an information may be filed by such officer. We think both of these contentions must be upheld. When the respondent was called upon to enter his plea to the information, he should have interposed any objection which he had to the filing thereof by the prosecuting attorney. A defendant in a criminal case should not be permitted to put a county and the state to the expense of preparing for a trial and then spring an objection that might and should have been interposed prior to the incurring of such expense.

Bal. Code, § 6802 (P. C. § 2077), provides that the prosecuting attorney may file an information "whenever any person is in custody or on bail on charge of felony or misdemeanor, and the court is in session, and the grand jury is not in session, or has been discharged." We think the expression "in session" means in actual session. Otherwise the words "or has been discharged" would be meaningless. In this case the grand jury adjourned from October 26 to November 4. During that time it was not in actual session, but it had not

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Opinion Per Curiam.

"been discharged." We think that during an interval of that kind the prosecuting attorney is authorized by this statute to file an information in a case of this character.

The judgment of the honorable superior court is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

RUDKIN, CROW, and DUNBAR, JJ., concur.

FULLERTON, J., concurs for the reason last stated.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7175. Decided September 15, 1908.]

THE CITY OF SEATTLE, *Respondent*, v. D. W. FELT *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS—ASSESSMENTS—APPEAL—REVIEW. An assessment by a commission of the benefits to property by reason of a local improvement will not be set aside as excessive upon conflicting evidence unless the evidence clearly preponderates against its correctness.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 20, 1907, confirming an assessment for local improvements, upon overruling objections thereto. Affirmed.

Byers & Byers, for appellants.

Scott Calhoun and *O. B. Thorgrimson*, for respondent.

PER CURIAM.—The city of Seattle by ordinance provided for the widening of Crescent Drive and East Galer streets, in the Interlaken addition to that city, between 20th Avenue North and 22nd Avenue North, at the cost of the property benefited. Crescent Drive and East Galer streets are parallel streets, and between them and extending into them thirty feet is an unplatted tract owned by D. W. and Eunice E. Felt and

¹Reported in 97 Pac. 226.

Ovid A. Byers. The improvement of the streets as ordered required the appropriation of these thirty-foot strips. Condemnation proceedings were accordingly begun, which resulted in an award to the owners of the property for the land taken of \$5,000. A commission was thereupon appointed to make an assessment of the property benefited to pay these awards, and an assessment roll was made out and returned into court in which the remaining property of the owners named was assessed at \$2,000. Objection to the assessment was made on the ground that the objector's property was assessed to an amount exceeding the benefits conferred and for an undue proportion of the cost of the improvement. These objections were overruled by the trial court and the assessment confirmed. This appeal was taken therefrom.

But one question is presented by the record, namely, was the objectors property assessed for an undue proportion of the cost of the improvement. The evidence on this question was conflicting, and while we feel it would have sustained a different conclusion on the part of the trial judge, we do not feel that it so far preponderates in favor of the objectors as to require a reversal of the order. As we have said under similar circumstances, the question how much a given tract of land is benefited or damaged by a street improvement is largely a matter of opinion on which men competent to judge of the matter will disagree, and that it is not, therefore, difficult to find witnesses who will testify that the assessment roll as returned by the commission is unjust. But it must be remembered that the roll is made up by men who have given the conditions special study, and who must be therefore much better informed as to the conditions surrounding the particular assessment than is one who has only a knowledge of the general conditions. Evidence to defeat the return, therefore, should clearly preponderate against its correctness. We have examined the record with care in the case before us, and do not find that it meets this condition.

The judgment will be affirmed.

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Opinion Per FULLERTON, J.

[No. 7201. Decided September 15, 1908.]

NORTHWEST THRESHER COMPANY, *Appellant*, v. LEWIS
DAHLGREN *et al.*, *Respondents*.¹

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—ACCORD AND SATISFACTION. An agent is shown to have had authority to make an accord and satisfaction of the amount due on promissory notes secured by chattel mortgage, by accepting the mortgaged and other property in discharge of the debt, pending a foreclosure, where it appears that the agent sold the machinery for which the notes were given, received the notes and mortgage, collected all payments, conducted the foreclosure, and received the property given in satisfaction.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered August 12, 1907, upon findings in favor of the defendants, after a trial before the court without a jury, in an action upon contract. Affirmed.

E. C. Dailey, for appellant.

F. E. Anderson, for respondents.

FULLERTON, J.—This action was brought by the appellant against the respondents to recover a balance alleged to be due upon three promissory notes. The notes in question were executed by the respondents and delivered to the Minnesota Thresher Manufacturing Company on December 30, 1892, and were secured by mortgage upon certain personal property. Foreclosure proceedings were begun in 1898, and the property taken from the possession of the mortgagors. Thereafter the appellant purchased the notes at a receiver's sale of the Thresher Company's assets, it having become insolvent. This action was brought on October 5, 1906. To the complaint, which was in the usual form, the respondents filed an answer in which they admitted the execution of the notes, but averred that the same had been paid and satisfied

¹Reported in 97 Pac. 228.

by an accord and satisfaction between the respondents and the Minnesota Thresher Manufacturing Company, made at the time of the mortgage foreclosure, by which the company took the mortgage property and certain other property then owned by the respondents in satisfaction of the mortgage debt.

Whether or not such a settlement was made was the only issue between the parties. On the question, the evidence was conflicting, but since the trial judge found in favor of the respondents, we shall not disturb his findings. The witnesses were before him, and he is in a much better position to judge of the weight of the evidence than we are, who must take the evidence from the printed record.

The appellant contends, however, that, conceding the respondents version of the transaction to be true, the defense was not made out, since it was shown that the transaction was had with an agent of the Minnesota Thresher Manufacturing Company, and it is not shown that he had authority to make such an agreement. But it was testified that the agent sold the machinery to the appellant for which the notes were given, that he received the notes and mortgage from the appellant, that he collected all payments made upon the notes, some of which payments were in the form of lumber and timber products, and that he conducted the foreclosure proceedings, and received on behalf of the company not only the mortgage property, but the other property not covered by the mortgage which the appellant turned over therewith. Here was such apparent general authority to deal with the notes as to warrant the conclusion that he had full power to make such a settlement, even as against the belated statement of an ex-officer of the corporation to the effect that the agent's authority was only to collect the notes.

The judgment is affirmed.

HADLEY, C. J., MOUNT, CROW, and ROOT, JJ., concur.

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Opinion Per FULLETON, J.

[No. 7272. Decided September 15, 1908.]

ABNER GIFFIN, *Appellant*, v. KING COUNTY, *Respondent*.¹

COUNTIES—CONTRACTS—BIDS—AUTHORITY OF COMMISSIONERS AS TO ROAD WORK. Bal. Code, § 3767, providing that county commissioners must open and work necessary county roads, and "in their discretion let out by contract to the lowest bidder, the construction or improvement . . . when the expenses . . . will exceed fifty dollars," reposes a discretion with the commissioners to contract therefor with or without bids; and a contract exceeding fifty dollars is valid without being let to bids.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 8, 1907, in favor of the defendant upon sustaining a demurrer to the complaint, dismissing an action on contract. Reversed.

Herr, Bayley & Wilson, for appellant.

Kenneth Mackintosh and *R. W. Prigmore*, for respondent.

FULLETON, J.—The appellant, who was plaintiff below, brought this action against the county of King to recover moneys advanced for the use of the county. His complaint was as follows:

"(1) That the county of King is now, and at all the times hereinafter mentioned was, a duly organized county in the State of Washington, and incorporated as such under the laws of the said state.

"(2) That on or about the 17th day of September, 1903, the plaintiff entered into an oral agreement with the board of county commissioners of said county of King, whereby, at the request of said commissioners and under their control and direction, plaintiff was to build, construct and improve for them and on their behalf the then unimproved portion of what is known as the 'Money Creek Road' in said county of King, state of Washington, being further known as 'Road No. 506', and being one of the so called county roads of said

¹Reported in 97 Pac. 230.

King county; that said commissioners agreed on behalf of said county of King to advance to plaintiff the money necessary in building and improving said road; that prior to said date said county commissioners had discharged the road supervisor for the district in which said road was situated and that at said date there was no road supervisor in and for said district.

"(3) That, in compliance with the request and instructions of said commissioners, plaintiff built, constructed and improved over four miles of said county road, known as 'Money Creek Road'; that said road was properly built and constructed in accordance with the specifications of the said county commissioners and under their supervision and has been accepted and used by the said county of King.

"(4) That at the time plaintiff began said work, in accordance with the request of said commissioners, said commissioners paid him the sum of five hundred dollars (\$500) for the purpose of buying material and supplies, and that since then said commissioners have paid, on account of labor and material used on their behalf by plaintiff in building said road, the sum of twenty-four hundred dollars (\$2400), making a total of twenty-nine hundred dollars (\$2900).

"(5) That in carrying on said work, in compliance with the request and direction of said county commissioners, plaintiff has expended, in addition to the above sum of twenty-nine hundred dollars (\$2900), the sum of eleven thousand six hundred forty-one and 87-100 dollars (\$11,641.87), all of which sum has been expended in payment for labor and necessary material and supplies for said work, and that, under the aforesaid agreement of said county commissioners, there is now due and owing from said county of King to plaintiff the sum of eleven thousand six hundred forty-one and 87-100 dollars (\$11,641.87).

"(6) That on or about the 27th day of October, 1904, plaintiff did present to the board of county commissioners for the county of King his claim, in writing, wherein he set forth the facts hereinabove referred to, and claimed the said sum of \$11,641.87 to be due him under the terms of said contract, and prayed that said claim be allowed and paid by the said county commissioners of the said county of King; that said commissioners have wholly failed and refused to allow

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said claim, and that no part of said sum of \$11,641.87 has been paid.

"Wherefore plaintiff demands judgment against the defendant for the sum of \$11,641.87, and for his costs and disbursements herein incurred."

A demurrer was interposed and sustained to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The appellant elected to stand on his complaint, whereupon judgment for costs and of dismissal was entered against him.

The demurrer was sustained on the ground that the county commissioners of King county did not bind the county by the contract they attempted to make on its behalf set forth in the complaint. Whether they did bind the county, is the question presented on this appeal.

The section of the statute defining the powers of boards of county commissioners with reference to county roads, in force at the time this agreement was entered into, reads as follows:

"The boards of county commissioners of the several counties in the state shall have general supervision over the roads in their respective counties. They must cause to be opened and worked such roads as are necessary for public convenience, which have been laid out and established according to law; levy such taxes for road and bridge purposes as are by law provided for; order and direct road supervisors especially in regard to work to be done on particular roads in their districts; in their discretion cause to be erected and maintained on such public roads as they may designate, guide posts, properly inscribed; in their discretion let out by contract to the lowest bidder, the construction or improvement of any road or bridge on the public roads, when the expense of such construction or improvement will exceed the sum of fifty dollars; remove any road supervisor for inefficiency or neglect of duty or malfeasance in office; order such warrants drawn on the county treasurer and payable out of the funds to the credit of any district as are necessary to pay for labor performed in said district under the direction of the road supervisor, except such work as may be performed by residents of

the district in payment of road poll tax or property road tax as hereinafter provided." Bal. Code, § 3767.

The county contends, and the trial judge held, that the clause in the foregoing section providing that the commissioners may in their discretion let out by contract to the lowest bidder the construction or improvement of any road or bridge on the public roads, when the expense of the improvement will exceed the sum of fifty dollars, makes it mandatory on the part of the commissioners to let all such contracts to the lowest bidder, and that any such contract not let without calling for bids, or other than to the lowest bidder, is beyond the powers of the commissioners, and void; the argument in support of the contention being that the phrase "in their discretion" refers to the letting of the contract, not the manner in which it shall be let—that is, the commissioners may in their discretion let the contract, but if they do let it, they must let it to the lowest bidder.

On the other hand, the appellant contends that the phrase refers to the manner of letting the contract—that is, the commissioners, when they let a contract which calls for an expenditure of more than fifty dollars, may, at their option, call for bids and let the contract to the lowest bidder, or they may let it on such terms as they deem just without calling for bids.

It seems to us that this latter construction is the correct one. It will be noticed that it is made mandatory on the part of the commissioners, in an earlier clause of the section quoted, to "cause to be opened and worked such roads as are necessary for public convenience which have been laid out and established according to law." The language is that "they must" do these things. After making this mandatory condition, it is hardly to be supposed that they would, in the same section, insert another condition to the effect that the work should be discretionary with the commissioners. Furthermore, the state's contention would be clearly expressed by the remainder of the sentence had the qualifying phrase

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been omitted. It must follow, we think, that the legislature intended by this phrase to confer on the commissioners a discretion as to the manner of letting a contract for the improvement of a road, rather than to make it imperative that they let it to the lowest bidder in all cases.

The judgment is reversed, and the cause remanded with instructions to reinstate the case and require the defendants to answer to the merits.

HADLEY, C. J., MOUNT, CROW, and ROOT, JJ., concur.

[No. 7332. Decided September 15, 1908.]

LILLIAN SCHLARB *et al.*, *Appellants*, v. LOUIS CASTAING *et al.*,
Respondents.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—DESCENT AND DISTRIBUTION. Upon the death of a husband his community real property descends one-half to the wife and one-half, share and share alike, to his children, who become tenants in common.

MORTGAGES—FORECLOSURE—PARTIES—NECESSARY PARTIES DEFENDANT. Minor heirs of a deceased mortgagor of community property are necessary parties defendant to an action to foreclose the mortgage.

LIMITATION OF ACTIONS—RECOVERY OF REAL ESTATE—ADVERSE POSSESSION—STATUTES—CONSTRUCTION—AUTHORIZED SALE—INFANTS—TENANCY IN COMMON. Laws 1893, p. 20, § 1 (Bal. Code, § 5501), providing that actions to recover real estate of which any person may be possessed for seven years "having a connected title deducible . . . from any sheriff . . . authorized to sell such land on execution" shall be brought within seven years after possession taken, operates to bar an action by minors to recover an interest in property sold under mortgage foreclosure execution, although the minors were necessary parties to the foreclosure and were not joined and the foreclosure did not affect their interests and the purchaser was only their tenant in common, where the purchaser understood he was buying the entire property and maintained adverse possession for seven years for his own exclusive benefit; since the sale was "authorized" if directed by a judgment, whether the judgment was subject to attack or not.

¹Reported in 97 Pac. 289.

SAME—PERSONS UNDER DISABILITY—INFANTS. The legislature has power to provide that statutes of limitations shall run against minors, and such was the intent of Laws 1893, p. 20, § 1, providing a seven-year limitation for lands held under judicial sale; since by section 5, only in the case of the 3rd and 6th sections of the act are infants excepted from its operation.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered September 20, 1907, upon findings in favor of the defendants, upon granting a nonsuit, after a trial on the merits, dismissing an action for partition. Affirmed.

Leo & Cass and *L. C. Whitney*, for appellants. The heirs of deceased were tenants in common. *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172; *Vermont Loan & Trust Co. v. Cardin*, 19 Wash. 304, 53 Pac. 164. The plaintiffs not being made parties to the foreclosure suit were not affected by it. *Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364; *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625; *Sawyer v. Vermont Loan & Trust Co.*, 41 Wash. 524, 84 Pac. 8; *Jones, Mortgages*, § 1414. The legal effect of the foreclosure proceedings was to acquire the undivided interest of the mother, that being the one-half, since the plaintiff in that action must have had actual knowledge or the means of knowledge of the interests of the infants. *Jones, Mortgages*, § 969; *McMahill v. Torrence*, 163 Ill. 277, 45 N. E. 269; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835, and note; *Müller v. Powers*, 119 Ind. 79, 21 N. E. 455, 4 L. R. A. 483, and note; 15 Ency. of Law, p. 645, § 5. The mistaken belief that the heirs were not necessary parties was a mistake of fact and not of law, for which no relief can be given. *Allen v. Galloway*, 30 Fed. 466; *Story, Equity* (9th ed.), § 138. The interest of the defendants in a foreclosure is all the court undertakes to sell, and it is all a purchaser gets. *McMahill v. Torrence*, *supra*; *Jones, Mortgages*, §§ 953, 1654; *Anrud v. Scandinavian-American Bank*, *Investment Securities Co. v. Adams*, and

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Citations of Counsel.

Sawyer v. Vermont Loan & Trust Co., *supra*. The defendants acquired the interest of the mother, and became tenants in common with the plaintiffs, and they did nothing afterwards that would be sufficient to start the general statute of limitations or seven-year statute to run against their cotenants. Freeman, Cotenancy (2d ed.), §§ 166-167; *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123. To start the statute to run against a cotenant there must be an ouster, a disseizin. Bal. Code, § 5517 (P. C. § 1153); *Day v. Davis*, 64 Miss. 253, 8 South. 203; *Morris v. Davis*, 75 Ga. 169. The possession was not hostile or exclusive, or manifested by adverse acts. 1 Cyc. 1073, § 4; *Cooter v. Dearborn*, 115 Ill. 509, 4 N. E. 388; *Todd v. Todd*, 117 Ill. 92, 7 N. E. 583; *Justice v. Lawson*, 46 West Va. 163, 33 S. E. 102; *Blackaby v. Blackaby*, 185 Ill. 94, 56 N. E. 1053; *McMahill v. Torrence*, *supra*; *Schoonover v. Tyner*, 72 Kan. 475, 84 Pac. 124; *Clark v. Beard*, 59 W. Va. 669, 53 S. E. 597. A sheriff's deed, purporting to sell the whole title, is no more than a quitclaim deed to the interest of the party actually sold. *Curtis v. Barber*, 131 Iowa 400, 108 N. W. 755, 117 Am. St. 425.

Boyle, Warburton, Quick & Brockway, for respondents, contended, among other things, that the possession was sufficiently adverse as against tenants in common. *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005; *Cain v. Furlow*, 47 Ga. 674; *Switzler v. Northern Pac. R. Co.*, 45 Wash. 221, 88 Pac. 137; *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172; *Armijo v. Neher*, 11 N. M. 645, 72 Pac. 12; *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; *Feliz v. Feliz*, 105 Cal. 1, 38 Pac. 521; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658; *Baird v. Baird's Heirs*, 21 N. C. 524, 31 Am. Dec. 399; *Lapeyre v. Paul*, 47 Mo. 586; *Littlejohn v. Barnes*, 138 Ill. 478, 28 N. E. 980. The statute runs against minors. *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. 854, 27 L. Ed. 808; *Schauble v. Schulz*, 137 Fed. 389; *Woodbury v. Schakleford*,

19 Wis. 65; *Powell v. Koehler*, 52 Ohio St. 103, 39 N. E. 195, 49 Am. St. 705, 26 L. R. A. 480; *Peterson v. Delaware River Ferry Co.*, 190 Pa. St. 364, 42 Atl. 955; *Hines v. Weaver*, 84 Ga. 265, 10 S. E. 741; *Mewburn's Heirs v. Bass*, 82 Ala. 622, 2 South. 520; *Norton v. New York*, 16 Misc. Rep. 303, 38 N. Y. Supp. 90; *Favorite v. Booher's Adm'r.*, 17 Ohio St. 548; *DeMoss v. Newton*, 31 Ind. 219.

FULLERTON, J.—This is an action for the partition of real property. The facts out of which the controversy arises are, in substance, these: On September 24, 1892, William A. Freeman and his wife, Belle Freeman, being then the owners of the property in question, mortgaged the same to Robert Maynard to secure the repayment, with interest, of a loan of \$1,500, made to them by Maynard. Mr. Freeman died intestate on February 2, 1894, leaving as his heirs at law two daughters and two sons, children of himself and Belle Freeman. Mrs. Freeman was shortly thereafter appointed administratrix of his estate. The mortgage debt was left unpaid, and was purchased from Maynard by Louis Castaing sometime during the year following Mr. Freeman's death.

In 1898 Castaing brought a suit to foreclose the mortgage. To this suit he made Mrs. Freeman a party, both in her official and individual capacities, but did not make the heirs at law of Mr. Freeman parties thereto. The foreclosure proceeded to a judgment and order of sale against the entire property, and the property was sold thereunder to Louis Castaing for the full amount of the mortgage debt, interest and costs. At the time of sale, a sheriff's certificate of sale showing a foreclosure of the property was issued and delivered to Castaing, and later, after the time for redemption had expired, a sheriff's deed was executed and delivered to him. Mr. Castaing entered into possession of the property immediately on receiving the sheriff's certificate of sale, and from that time to the commencement of the present action has

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maintained open and notorious possession of the property, paying all state, county and municipal taxes that have been assessed thereon, such possession continuing for a period of more than seven years next after possession was taken. At the time the foreclosure proceedings were instituted, two of the heirs of William A. Freeman were minors. The elder of these reached the age of majority some four years after his father's death, while the younger was still a minor at the time of the institution of the present action.

The appellants in the action at bar are the children of William A. Freeman. They sue to recover a half interest in the land on the theory that their father's interest and title therein descended to them upon his death, and was not cut off by the foreclosure proceedings had by Castaing against their mother. In substance, they allege that they are the owners of an undivided one-half interest in the property, holding the same as tenants in common with the respondents; that the respondents are in possession thereof and deny that the appellants had any title or interest therein and refuse to account to them for any share of the rents and profits of the property. To the complaint the respondents make two contentions: First, that the interests of the appellants were cut off by the foreclosure proceedings; and, second, that any right to recover, conceding that their interests did survive the foreclosure, was barred by the seven-year statute of limitations. The trial court held with the respondents on the last ground stated, and entered judgment to the effect that the appellants take nothing by their action. This appeal is from that judgment.

While there is a controversy between counsel as to the respective relations of the parties to the property, and their rights growing out of the foreclosure sale, we do not think the questions suggested merit extended discussion. Since the property was the community property of William A. Freeman and his wife Belle Freeman, it passed, on the death

of Mr. Freeman, one-half to Mrs. Freeman as the survivor of the community, and one-half share and share alike to the appellants as the sole legitimate issue of the body of Mr. Freeman, and that these several persons, as long as they retained title to the property, held it as tenants in common. It must follow, also, that the appellants were necessary parties to the foreclosure proceedings, if their interests in the property were to be cut off, and as they were not made parties thereto their interests were not affected by it; that the only effect of that proceeding was to pass the title of the one-half interest of Mrs. Freeman to the purchaser at the foreclosure sale, and to make such purchaser a tenant in common in the property with the appellants.

We cannot think, however, that when the purchaser entered into possession of the property after his purchase at the sale, that his possession conferred seizure upon his cotenants. It is clear that he understood that he was purchasing the entire property, and that his entry into possession was for his sole and exclusive benefit as owner of the property, and that he never thereafter recognized the appellants or any one in privity with them as having any interest in the property. Such a possession, under the rule of *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005, was sufficiently adverse, even against a tenant in common, to start running the statute of limitations. That case is authority also for the holding that the statute has run against the appellants who had reached the age of majority at the time the purchaser entered into possession of the property under the foreclosure sale, as since that time his possession has been actual, open and notorious, under color of title made in good faith, and during such time he has paid all taxes legally assessed on such lands. That case was founded, however, upon the third section of the act of 1893 (Laws 1893, p. 20), and by the fifth section of the same act it is expressly provided that the third section shall not "extend to lands or tenements when there shall be an

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adverse title to such lands or tenements, and the holder of such adverse title is an infant or person under legal age, or insane."

If, therefore, the appellants who were minors at the time the respondents entered into possession of the premises are barred of their right of recovery, it is in virtue of the first section of the act cited, which is made applicable to minors as well as adult claimants of property. That section reads as follows:

"That all actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual, open and notorious possession for seven successive years, having a connected title in law or equity deducible of record from this state or the United States, or from any public officer, or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title." Laws 1893, p. 20, § 1, Bal. Code, § 5501 (P. C. § 1158).

The question must turn, it will be observed, on the meaning that is given to the word "authorized." If that word is to have the meaning of "lawfully authorized," that is to say, if the authorization must have behind it a judgment or decree of a court of record valid against both collateral and direct assaults, then clearly this sale is not authorized within the meaning of that word as it is used by the statute. But, on the other hand, if its meaning is that a sale is authorized when it is directed by a judgment or decree of a court of record fair upon its face, then it is just as clear that the sale was authorized. It seems to us that the latter is the correct meaning. In legal parlance, the order of the court which appar-

ently finally determines the rights of the parties in the action or suit is spoken of as the judgment or decree. In fact, so general are these terms in the common understanding that the word valid, voidable, or void is usually prefixed to them in order to mark their relative value. The legislature we think, since it used only the general terms without a prefix, must have meant the first order entered by the court which purported to determine finally the rights of the parties in the action, regardless of the question of the validity of that order. To give it any other meaning would be to destroy the purposes of the act. If the authorization to be valid must have behind it a judgment or decree invulnerable to every form of assault, there would be very little need of the statute. It could then only apply to the proceedings of the sheriff had in the execution of the writ or order of sale, and it would be hard to conceive of a case where the sheriff has made a sale and so defectively executed the writ or order as to confer no rights at all upon the purchaser at the sale. The real evil lay in the proceedings back of the judgment or decree, and it was this the statute intended to correct.

It is argued that this section was not intended to apply to the estates of minors, but we think the statute clear upon this question. The statute as originally enacted defined three distinct cases where color of title, accompanied with certain conditions, would operate as a bar, after a fixed time, to a recovery by the legal owner. Minors and insane persons were exempted from the operation of two of them. Manifestly, therefore, the third was intended to apply to minors as well as to adults. The power of the legislature to enact such a statute is indisputable. The rule cannot be better stated than in the language of Mr. Justice Miller in *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. 854, 27 L. Ed. 808, where he uses the following language:

"It is urged that because the plaintiff in error was a minor when this law went into operation, it cannot affect her rights.

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But the constitution of the United States, to which appeal is made in this case, gives to minors no special rights beyond others, and it was within the legislative competency of the state of Louisiana to make exceptions in their favor or not. The exemptions from the operation of statutes of limitation usually accorded to infants and married women do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights."

The judgment appealed from is affirmed.

HADLEY, C. J., MOUNT, and ROOT, JJ., concur.

[No. 7361. Decided September 15, 1908.]

GEORGE H. REES, *Appellant*, v. HUGH I. WILSON *et al.*,
Respondents, C. L. MILLER, *Defendant*.¹

MECHANICS' LIENS—PARTIES—CORPORATION SUCCEEDING PARTNERSHIP—NOTICE—LEASEHOLD ESTATE. Where property was leased to a partnership, which assigned the lease to a corporation of the same name formed for the purpose, a subcontractor claiming a mechanics' lien against the leasehold is not excused from making the corporation a party by reason of the fact that there was no apparent change in the management or possession, where the corporation had taken possession more than a year before the work was done, was in possession at the time, made the original contract, and there was no concealment or fraud.

SAME—LIMITATIONS—LAPSE OF LIEN. A mechanics' lien lapses unless action is commenced against the owner of the property within eight months after the filing of the lien claim.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 23, 1907, upon findings in favor of the defendant, dismissing on the merits an action to foreclose a mechanics' lien, after a trial before the court. Affirmed.

¹Reported in 97 Pac. 245.

Shank & Smith, for appellant.

George McKay and *Thomas B. McMahon*, for respondents.

FULLERTON, J.—On October 17, 1903, the owners of the property known as the Rainier-Grand Hotel, in Seattle, leased the same to W. McC. White and Hugh I. Wilson, both of Silver Bow, Montana, for a term of years. Immediately on the execution of the lease, the lessees put their representative in charge of the property. They thereupon formed a corporation under the laws of the state of Montana, under the name of The Wilson & White Company, which company took possession of the property some four or five days after the execution of the lease. A formal assignment of the lease was made in writing some six months later. In November, 1904, the corporation entered into a contract with the defendant C. L. Miller, by which Miller agreed to make certain repairs and changes in the hotel buildings, which included the laying of certain tiling on the hotel barroom floor. Miller sublet the contract for laying the tiling to the appellant George H. Rees. Rees laid tiling on the floor, but of a different color and pattern from that called for in the plans and specifications according to which Miller agreed to do the work in his contract with The Wilson & White Company. The company refused to accept or pay for the work as a compliance on Miller's part of its contract with him, and on Miller's refusal to pay for it, the appellant filed a lien on the lessee's interest in the hotel property to secure payment. This action was brought to foreclose the lien.

The action was begun originally against Wilson and White, as copartners, and C. L. Miller. Afterwards, but not until eight calendar months had expired from the time of filing the lien, The Wilson & White Company was made a party defendant. The respondent defended upon two grounds: (1) That the tiling laid did not conform to the

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agreement between the corporation and Miller; and (2) that the corporation was the owner of the leasehold interest against which the foreclosure was sought, and the action was not begun against it until after the expiration of eight calendar months from the time the lien was filed. The court found in favor of the respondents on both grounds, and dismissed the action as against Hugh I. Wilson and W. McC. White and the Wilson & White Company, but allowed the appellant a personal judgment against C. L. Miller.

The appellant contends that, as against his claim of lien, the leasehold interest must be deemed the property of Hugh I. Wilson and W. McC. White, and not the property of the respondent corporation. He bases this contention on the claim that there was no apparent change of possession or in the management of the hotel property at the time Wilson and White transferred it to the corporation, and that the formal assignment of the lease was never acknowledged. But conceding these matters to be facts established by the record, we cannot think they warrant the deduction the appellant would draw from them. There is not the slightest evidence in the record that he was misled by them, or that he ever knew of their existence until after he had filed his lien and commenced his action in foreclosure. On the other hand, it was undisputably shown by the record that the respondent, The Wilson & White Company, was a corporation organized under the laws of the state of Montana, and had taken the necessary steps to authorize it to do business in this state; that it had taken possession of the hotel building more than a year prior to the time the appellant did work therein, and was in such possession at the time the work was done. It was shown, also, that it described itself as a corporation in its contract with Miller, the contract which authorized Miller to employ the appellant. If the officers of the corporation had held it out as a partnership, and thereby deceived the appellant to his injury, no doubt a court of equity would relieve him because

of the fraud. But no such case is made here. There was no holding out or attempt at concealment. The appellant, therefore, was bound to inquire as to the fact, and since he did not, the courts are without power to relieve him.

In this state a mechanics' lien does not bind the property subject to the lien for a longer period than eight calendar months after the lien claim has been filed, unless an action be commenced in the proper court within that time to enforce the lien, and as the appellant in the present case did not commence his action to foreclose against the owner of the property within the statutory period, it follows that the trial court rightly held that the lien had lapsed. It is unnecessary to notice other questions argued in the brief.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

[No. 7369. Decided September 15, 1908.]

EMMET DORGAN, *Appellant*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Respondent*.¹

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE. A shoveler at an ash pit in an engine yard is guilty of contributory negligence, precluding any recovery, and a nonsuit is proper, where it appears that while in the ash pit waiting for the engine to be moved he stood with his back to the engine, out of sight of the driver, and unconsciously placed his hand on the rail near the wheel, so that his fingers were cut off as the engine started to move off, and it appears from his own evidence that he left a place of safety and was not giving attention to his surroundings.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 8, 1908, upon granting a nonsuit at the close of plaintiff's case, in an action for personal injuries sustained by a shoveler at an engine ash-pit. Affirmed.

¹Reported in 97 Pac. 229.

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Boyle, Warburton, Quick & Brockway, for appellant.*B. S. Grosscup*, for respondent.

FULLERTON, J.—The ash pit of the respondent railway company at the city of Tacoma is located near its round-house, and within about 200 feet of its main freight track. The pit is about 100 feet long, and a railway track extends over it for its entire length. The track is level with the surface of the ground and is elevated above the bottom of the pit some $4\frac{1}{2}$ feet. The pit is wide enough so that a space five feet wide is left between the railway track over the pit and one side of the pit, along which side is another track on which cars are placed for receiving ashes. When an engine is brought in from the road, it is turned over to employees who take it onto the track over the ash pit, and remove the ashes from the fire box by opening grate doors and letting the ashes fall into the pit from one side and beneath the engine. The ashes are then removed from the pit by shoveling them into cars placed on the track along the side of the pit. The employees who remove the ashes from the engines are commonly called "fire-knockers," and those who remove them from the ash pit, "shovelers." The shovelers, in the performance of their work, have no occasion to go onto the car tracks, nor in front of the engines; they work in the open space between the tracks, and while they occasionally have to take ashes from under the track the process incurs no danger, even when cars are passing over them.

In July, 1905, the respondent employed the appellant to work in the ash pit as a shoveler. He was given no instructions as to the nature of his work, but was simply taken to the pit where a number of others were engaged in similar work, handed a shovel, and told to shovel ashes into the cars. The appellant worked in the pit on the day he was employed, and until four o'clock on the fourth day thereafter. At that hour, the shovelers had cleaned out the pit and were about

to quit work for the day, when an engine was brought by the knockers over the pit for the purpose of emptying it of its ashes. On seeing the engine coming, the appellant called to his co-workers, remarking that they had better wait and shovel out the ashes from this engine so that they would have a clean pit to start with in the morning. One of the shovelers stayed with him.

While the engine was being emptied of its ashes, the appellant stood behind it with his back towards it, holding his hand on the rail immediately behind the wheels of the tender. After the ashes had been removed, the engine was started backwards, and one of the wheels of the tender passed over the appellant's hand, severing the fingers therefrom. The appellant's position was such that the engine driver could not see him when at the throttle of the engine. The appellant knew that the engine would be moved as soon as the ashes were dumped, but took no thought of the direction in which it might be moved; in fact, he says he was unconscious at the time of the fact that he had his hand on the rail. His work did not require him to touch the rail, nor did the moving of engines on this track render his place of work unsafe. His place of work was at the side of the track, and any contact he made therewith was outside of any duty he had to perform. He heard the engine bell ring at the instant the wheel passed over his fingers. No other warning of the purpose to move the engine was given.

This action was brought to recover for the injury suffered. The several acts relied upon in the court below to constitute negligence were, that the respondent permitted incompetent servants to move its engines on and off the ash pit; that it failed to establish any adequate rule as to giving warning when an engine in the yards was about to be moved; that it failed to instruct the appellant as to the rule it had established concerning the giving of warnings; that it moved the engine upon the appellant in this particular instance without

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giving any warning whatsoever. On the trial, at the conclusion of the appellant's case in chief, the trial court sustained a challenge to the sufficiency of the evidence, and entered a judgment to the effect that the appellant take nothing by his action, and that the respondent have and recover its costs.

The judgment of the trial court was based on the holding that the appellant was guilty of contributory negligence, and the correctness of this holding presents the only question we have found it necessary to consider on this appeal. We think the court rightly held that the respondent was not entitled to recover. He voluntarily quit a place of safety, which the master had provided for him as a place in which to work, and took a place of danger. He knew that the engine was put over the ash pit for a particular purpose, and that it would be taken away as soon as that purpose was accomplished. He stood with his back to the engine, out of the sight of the engine driver, and in a position where he must inevitably get hurt if the engine moved toward him. He was not giving attention to anything. He was not working, nor absorbed in his work. He was simply waiting for the engine to move so that he could finish his work. That he was paying no attention to his surroundings, his own evidence abundantly shows, and he seems to have been oblivious to them. No doubt he forgot for the moment his situation, but this does not excuse him from the folly of his act. It was his duty to exercise ordinary care for his own safety, and he must bear the brunt of any injury caused by failure on his part to do so. It may be that the respondent would have been liable had the fire-knockers known of his situation and condition and moved the engine upon him, but it is not only shown that they did not know of it but did not even anticipate that he would take a position of danger. If, therefore, it was negligence on their part to move the engine with so little preliminary warning, the appellant is barred of recovery by his own negligence.

This conclusion renders it unnecessary to discuss other questions suggested and argued in the briefs. The judgment is affirmed.

HADLEY, C. J., MOUNT, and ROOT, JJ., concur.

[No. 7388. Decided September 15, 1908.]

JOHN RICE, *Appellant*, v. THE HARTFORD INSURANCE
COMPANY, *Respondent*.¹

INSURANCE—CONDITIONS—BREACH — PROCURING OTHER INSURANCE. A policy of fire insurance providing that it shall be void if the insured procures any other insurance on the property is void where the insured subsequently procures additional insurance, although innocently and in ignorance of the conditions of the policy, which he left in the hands of the agent for safe keeping and never saw.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered November 18, 1907, in favor of the defendant, on motion for judgment on the pleadings, dismissing an action upon a policy of fire insurance. Affirmed.

Howard Seabury and Smith & Brawley, for appellant.

Granger & Magill, for respondent.

FULLERTON, J.—The respondent, on December 21, 1905, issued its policy of insurance to the appellant, whereby it insured the appellant's dwelling house and the furniture therein in the sum of \$350 against loss by fire for a period of three years. The policy contained the following clause:

"This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The policy was procured by the appellant through an agent of the respondent company residing at the appellant's

¹Reported in 97 Pac. 238.

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home town, and when written was left with the agent for safe keeping. The appellant did not examine the policy after its issuance, and had no actual knowledge that it contained the clause above cited. The arrangement for safe keeping the policy, however, was between the agent individually and appellant, and it could have been seen by the appellant at any time had he so desired. On May 15, 1906, the appellant, being still in ignorance of this condition of the policy, and in ignorance of any custom of insurance companies to place such a clause in their policies, applied orally for, and obtained insurance in the sum of \$500 from another insurance company on the property described in the policy in suit. Thereafter the dwelling house and its contents were totally destroyed by fire, without fault on the part of the appellant, resulting in a loss to him far in excess of the amount of the insurance in both of the policies. This action was brought to recover upon the insurance policy first mentioned. The trial court held, on the foregoing facts appearing, that the policy was void, and entered judgment dismissing the action.

The only question presented on this appeal is whether the policy was avoided by the fact that the respondent procured additional insurance without the consent of the appellant indorsed on or added to the policy. The appellant concedes that the great weight, if not the entire current of authority in other jurisdictions, is against him, but he argues that this court has adopted a more liberal rule of construction with reference to insurance contracts than that generally maintained, and that the spirit of the cases from this court, although not directly in point, permit a recovery in this case. The cases referred to are, *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86; *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26; *Pioneer Sav. & Loan Co. v. Providence Wash. Ins. Co.*, 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397; and *Neher v. Western Assurance Co.*, 40 Wash. 157, 82 Pac. 186.

But these cases, an examination of them will disclose, are cases in which the insurance companies accepted the premiums paid by the applicant and then, without notice to him, issued a policy void in its inception, if the terms of the policy delivered were to be given force and effect. The applicant not only got nothing for the premium paid, but the act of the company tended to deceive him and mislead him into the belief that he had insurance upon his property, when in fact he had none. The court did not hold that the insurance company could not make valid conditions such as were there held not binding upon the insured. It was the manner in which they were made that led the court to repudiate them, not any inherent vice in the conditions themselves.

But in this case there was no deceit, fraud, or misrepresentation of any kind. The policy attached at the time of its issuance, and would have remained a valid obligation of the company had the appellant not violated its conditions. It is true, he violated the conditions of the policy innocently and in ignorance of them, but his ignorance was his own fault, and was not in any manner induced by the action of the insurance company. These considerations bring the case within the rule of *Jump v. North British etc. Ins. Co.*, 44 Wash. 596, 87 Pac. 928, rather than the rule of the cases above cited.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and ROOT, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 7895. Decided September 15, 1908.]

PUGET REALTY COMPANY, *Appellant*, v. KING COUNTY,
Respondent.¹

TAXATION—ASSESSMENTS—EXCESSIVENESS—RELIEF FROM—MISTAKE. The courts will grant relief from an excessive assessment, and require repayment of the tax, where it appears that 12.22 acres was by mistake assessed as 22.22 acres at the same rate per acre as adjacent property, making the assessment \$13,000 in excess of what it would have been if the assessor had known the area; nor is it necessary to relief that appeal be made to the board of equalization where the mistake was not discovered until after payment of the tax.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 28, 1908, upon granting a nonsuit, after a trial on the merits, dismissing an action to recover taxes paid. Reversed.

Daniel Landon and Moncrieffe Cameron, for appellant.

Kenneth Mackintosh and Ernest B. Herald, for respondent.

FULLERTON, J.—In this action the appellant sought to recover from King county the sum of \$343.22, paid as taxes on an overassessment. The facts out of which the controversy arises are, in substance, these: The appellant owned a tract of land, situated in King county, and subject to taxation therein, containing 12.22 acres. This property was not assessed by any of the regular deputy assessors for the year 1906, and the fact of its omission was discovered when making up the assessment roll. The assessor thereupon assessed it at the same valuation per acre that surrounding and adjacent property was assessed. In making up the assessment, however, he estimated the tract to contain 22.22 acres, and assessed it at some \$13,000 more than he otherwise would had he known its exact area. The taxes were carried out on the assessment roll on the basis of this valuation. The appel-

¹Reported in 97 Pac. 226.

lant owned other lands in King county likewise subject to taxation. After the taxes became payable in 1907, it sent to the treasurer a description of its property in King county, together with a signed check on its banker, payable to the county treasurer, with the amount left blank, and directed the treasurer to ascertain the amount of taxes due upon the several tracts described, fill in the blank with the amount of such taxes, and cash it in payment of the same. The treasurer did so, and it was upon receiving the tax receipts that the appellant learned that it had been over assessed on the 12.22 acre tract. The appellant sought to have the assessment corrected and the overpayment returned, but while it obtained a correction in the description and valuation for the subsequent year it was obligated to pay under that assessment, it was refused repayment of the amount it had overpaid, on the theory, apparently, that the county commissioners were without power to return the money. The appellant made no examination of the assessment rolls prior to the levy of the tax to ascertain whether or not any of its property had been overvalued, nor did it appear before the board of equalization for that purpose prior to the payment of the tax it now seeks to recover.

On the foregoing facts, the trial court held the appellant to be without remedy, entering a judgment against it of dismissal, and for costs.

The respondent contended in the court below, and it argues in this court, that the appellant is barred from recovery because it has shown nothing more than a mistake on the part of the assessor resulting in an overvaluation, and that a court will never interfere to correct a mere mistake of the assessing officer in matters of taxation, but that it must appear that the officer, in making the assessment, has acted maliciously, fraudulently, or capriciously, or without the exercise of his fair judgment before his acts will be disturbed by the courts; and further, that the record here does not show any of the elements necessary to warrant interference.

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Opinion Per FULLERTON, J.

In *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553, this court reviewed its previous holdings as to what facts were necessary to be shown to warrant the court in interfering with an assessment as returned by the assessing officers, summarizing the decisions in the following language:

"Fraud on the part of the assessing officer may be presumed from a palpably excessive or exorbitant overvaluation. The court will grant relief for an arbitrary, fraudulent, or malicious excessive valuation by the assessing officer. Where the assessing officer has exercised an honest judgment, and no fraud or arbitrary or capricious action in making the assessment is shown or can be presumed, the court will not interfere. Where it appears that the assessing officer endeavored honestly to get at the true value, and there is an honest difference of opinion as to the value, the judgment of the officer is conclusive. If property, even if overvalued, is assessed in the same proportion as other like property within the jurisdiction of the assessing officer, and the system of valuation adopted operates equally on all other property, the constitutional provision as to uniformity of taxation is complied with."

It announced the same principle, also, in the subsequent cases of *Henderson v. Pierce County*, 37 Wash. 201, 79 Pac. 617, and *Dickson v. Kittitas County*, 42 Wash. 429, 84 Pac. 855. These cases, it will be observed, lay down the rule as contended for by the respondent, with the exception, perhaps, that fraud, capriciousness, and the want of exercise of an honest judgment, may be inferred from the fact that the assessment greatly exceeds the value of the property, and is higher proportionally than the assessment upon other like property. It is perhaps true, also, that the language of these cases does not cover a case such as the present record presents. Here there was no fraud or capriciousness on the part of the assessor, or the failure to exercise an honest judgment by that officer on the facts as he understood them. The overassessment was caused by the fact that the officer made a mistake as to the quantity of land he was assessing.

But though the case may not fall within the language of the decisions cited, we think it falls within the principle of them. It is manifest that the appellant did not have the honest judgment of the assessor on the facts as they existed. It is clear that, but for the assessor's error, the appellant's property would have been assessed some \$18,000 less than it was assessed, had the assessor correctly understood the conditions. This was a mistake, honestly made it is true, but its effect upon the appellant is just the same as it would have been had it been made dishonestly and with the purpose of defrauding it. Why then should it not have the same relief? We think it should. We think, also, that it was not mistakes of this character that the court referred to when it said that mere mistakes would not be corrected. It referred to mistakes such as may be classed under the head of inadvertences, which do not materially affect the rights of the owner, not those that amount to what is practically a double assessment. The objection that the proper remedy was to appeal to the board of equalization is met by the case of *Müller v. Pierce County*, 28 Wash. 110, 68 Pac. 358.

We conclude, therefore, that the appellant made a *prima facie* showing entitling it to relief. The judgment appealed from will be reversed, and the cause remanded with instructions to reinstate the case and put the county upon its defense.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

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Opinion Per Curiam.

[No. 7402. Decided September 15, 1908.]

D. M. ANGUS, *Appellant*, v. JOE WAMBA, *Respondent*.¹

APPEAL—REVIEW—NEW TRIAL. The granting of a new trial without specifying the ground therefor will be affirmed on appeal if it can be sustained on any of the grounds stated in the motion.

SAME—ABUSE OF DISCRETION. The granting of a new trial on the ground of insufficiency of the evidence will be reviewed only for abuse of discretion, and abuse of discretion will not be found where the evidence was contradictory on all contested issues.

Appeal from an order of the superior court for Benton county, Zent, J., entered December 10, 1907, granting a new trial upon motion of the defendant, after a trial on the merits and the verdict of a jury in favor of the plaintiff, in an action on contract. Affirmed.

J. W. Callicotte, for appellant.

Bert Linn and Lon Boyle, for respondent.

PER CURIAM.—The appellant, a practicing physician and surgeon, brought this action against the respondent to recover the sum of \$240, alleged to be the reasonable value of professional services rendered the respondent. The respondent, answering, admitted the performance of the services set forth in the complaint, but denied that the same were reasonably worth the sum alleged, or any sum; and by way of a counterclaim, averred that the appellant, in the rendition of the services, was guilty of gross malpractice, whereby the respondent was damaged in the sum of \$5,000. The appellant filed a denial of the new matter in the answer, and on the issues thus made a trial was had to a jury, which returned a verdict for the appellant for the sum of \$165. The respondent thereupon moved for a new trial, on the grounds: (1) That the jury committed error in assessing the amount of the

¹Reported in 97 Pac. 246.

recovery; (2) that the evidence was insufficient to justify the verdict; and (3) for error of law committed by the court at the trial of the action. At the hearing upon the motion, the court granted a new trial, making a general order to that effect without reciting the grounds upon which the order was rested. This appeal is taken from the order granting the new trial.

As the order of the court granting the new trial was general, this court will not reverse the order if there is any ground stated in the motion upon which it can be sustained. Turning to the motion, it will be observed that one of the grounds upon which a new trial was asked was insufficiency of the evidence to justify the verdict. This ground involved the trial court's discretion, which will be reviewed only for manifest abuse. An examination of the record fails to show any abuse of discretion in granting a new trial on this ground. The action was sharply contested, and the record shows contradictory evidence on all the contested issues. In such a case, it is the prerogative of the trial court to review the evidence and grant or refuse to grant a new trial as he deems the evidence will warrant. As we said in the case of *Welever v. Advance Shingle Co.*, 34 Wash. 331, 75 Pac. 863:

"'Insufficiency of the evidence to justify the verdict' is, by statute, expressly made a ground for new trial. Sec. 5071, Bal. Code. The statute does not say that such ground shall not be considered when there may be some evidence in support of the verdict. Evidently the exercise of discretion is lodged with the trial court, who hears and observes the witnesses, and who is therefore able, from much experience, to estimate the value of the testimony. It would divest the trial court of the right to exercise what is often a wholesome discretion, if it should be held that a new trial should not be granted for insufficiency of evidence when there is any evidence whatever to support the verdict. The appellate court should, therefore, not review the discretion of the trial court in such a case further than to determine whether the proper discretion in the premises has been abused. *Trumbull v. Jackman*, 9 Wash. 524, 37 Pac. 680; *Rotting v. Cleman*, 12

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Wash. 615, 41 Pac. 907; *Corbitt v. Harrington*, 14 Wash. 197, 44 Pac. 132; *McBroom etc. Co. v. Gandy*, 18 Wash. 79, 50 Pac. 572; *O'Rourke v. Jones*, 22 Wash. 629, 61 Pac. 709; *Latimer v. Black*, 24 Wash. 231, 64 Pac. 176; *Hughes v. Dexter Horton Co.*, 26 Wash. 110, 66 Pac. 109. In several of the above cases it is held that, when there is a substantial conflict in the evidence, this court will not hold that the discretion of the trial court is abused by the granting of a new trial. Within the rule above discussed, there is nothing in this record to show that the lower court abused its discretion in granting the new trial."

See, also, *Wait v. Robertson Mortgage Co.*, 37 Wash. 282, 79 Pac. 926.

The judgment is affirmed.

[No. 7146. Decided September 15, 1908.]

THE STATE OF WASHINGTON, *on the Relation of W. M. Manning, as County Surveyor of Stevens County, Respondent, v. THOMAS R. MAJOR et al., Appellants.*¹

COUNTIES—COMMISSIONERS—DUTY TO PROVIDE SURVEYOR WITH INSTRUMENTS—MANDAMUS—WHEN LIES. Under Bal. Code, § 499, providing that the county surveyor shall be furnished with "all necessary cases and other suitable articles," and Bal. Code, § 342, giving the county commissioners general charge of county property and business, mandamus will lie to compel the county commissioners to provide the county surveyor with a transit, where it is admitted that it is necessary to the proper discharge of his official duties, as it is duty enjoined by law as to which there is no discretion; and the fact that the surveyor procured an instrument of his own, and presented a bill therefor, which was disallowed, is no defense.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered November 4, 1907, in favor of the plaintiff, upon overruling a demurrer to an application for a writ of mandamus. Affirmed.

¹Reported in 97 Pac. 249.

J. A. Rochford and *John P. Judson*, for appellants.

W. H. Jackson, for respondent.

MOUNT, J.—This action was brought in mandamus to compel the county commissioners of Stevens county to furnish a surveyor's transit for the use of the county surveyor. A general demurrer to the affidavit was filed by the county commissioners. This demurrer was overruled, and the commissioners elected to stand on the demurrer. A peremptory writ of mandate was issued by the lower court commanding the county commissioners "to procure, furnish and provide for the use of the county surveyor and for his said office a surveyor's transit," or in the alternative, to allow and pay for the transit ordered by the surveyor for his own use for his said office. The county commissioners have appealed from that order.

The affidavit and the writ allege, in substance, that the relator is the duly qualified and acting county surveyor of Stevens county; that the appellants are the duly authorized and acting commissioners of said county; that a surveyor's transit is necessary for the proper discharge of the duties of county surveyor; that it is impossible for relator to discharge the duties of his office without such instrument; that he applied to the board of county commissioners to furnish said instrument for use in his office, but said board refused to do so, and that afterwards relator was compelled to, and did, furnish such instrument for his official use at his own expense, and presented a bill therefor to said board, which bill was rejected. These facts are all admitted. It is argued by appellants that mandamus is not the proper remedy, because it is not the duty of the county commissioners to furnish such instrument for such office, and because the relator has a remedy by appeal from the refusal of the county commissioners to allow his bill for the purchase of the instrument, and also because it is shown by the affidavit that relator has such instrument of his own which he is using.

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Opinion Per MOUNT, J.

It may be conceded that the writ of mandamus will not issue to compel the performance of an act which the law does not enjoin as a duty, or where the act or duty of an officer calls for the exercise of discretion or judgment. The statute relating to county surveyors provides, at § 499, Bal. Code, (P. C. § 4220), as follows:

“The county surveyor shall keep his office at the county seat in such room or rooms as are provided by the county, and he shall be furnished with all necessary cases and other suitable articles, and also with all blank books and blanks necessary to the proper discharge of his official duties,” etc.

The county commissioners have general charge of the county property and the management of the county funds and business. Bal. Code, § 342 (P. C. § 4098). It cannot be doubted, therefore, that it is the duty of the county commissioners to furnish the county surveyor with all cases “*and other suitable articles*” necessary to the proper discharge of his official duties. When it is admitted that a surveyor’s transit is necessary for the proper discharge of the duties of county surveyor, and when it is admitted that it is impossible for him to perform his official duties without such instrument, it would seem to require no further argument to show that such instrument is a necessary article for his office. A surveyor’s transit is certainly included within the meaning of the words “*other suitable articles*” used in the statute. It follows that the procurement of such an instrument is a duty enjoined by law upon the county commissioners, and that mandamus will lie to require the performance of that duty. There is no discretion on the part of the commissioners as regards the duty of furnishing the instrument. The price or the make of the instrument may involve some judgment or discretion, but that question is not here, because it is admitted that appellants have refused to furnish or procure or pay for any instrument.

The fact that the respondent had purchased such an instrument at his own expense or was using the same, and that

he had presented a bill therefor to the county commissioners and the bill had been rejected, does not relieve the appellants. The county surveyor is not required to use or furnish his own instruments no matter what he may have. He may or may not do so as he chooses, but this does not relieve the county of the duty of furnishing necessary suitable articles. The fact that respondent requested the payment of the bill for the instrument, or the fact that he is attempting to sell his own instrument to the county, if such be the fact, and that the county has refused to purchase, stands on the same basis. These facts all tend to show that the county refused to furnish necessary suitable articles. They were irrelevant for any other purpose. Appellants argue that, since law books are necessary for the prosecuting attorney, if county surveyors may require the county commissioners to furnish surveyor's transits because they are necessary, then county commissioners may be required to furnish libraries to the county attorneys. This would no doubt follow if there were a statute providing for it such as there is for county surveyors. But in the absence of a statute, there is no such duty.

We think the trial court properly made the order appealed from. It is therefore affirmed.

HADLEY, C. J., CROW, and ROOT, JJ., concur.

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Opinion Per MOUNT, J.

[No. 7151. Decided September 16, 1908.]

JOHN LEHTONEN, *Appellant*, v. MARYSVILLE WATER AND
POWER COMPANY, *Respondent*.¹

DEEDS—RESERVATION OF STANDING TIMBER—TIME FOR REMOVAL—CONSTRUCTION. Upon the sale of land reserving to the grantor the standing timber, under a clause requiring its removal within two years, the timber reverts to the owner of the land if it is not removed within the time fixed; as the clearly expressed intention is that it be removed within that time.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered November 6, 1907, upon sustaining a demurrer to the complaint, dismissing an action for specific performance. Reversed.

Padgett & Bell, for appellant.

Bell & Austin, for respondent.

MOUNT, J.—The lower court sustained a general demurrer to plaintiff's complaint and dismissed the action. Plaintiff appeals.

The only question presented here is whether standing timber, reserved upon the sale of real estate, reverts to the grantee after the time when the grantor agreed to remove the timber. The respondent sold to the appellant a certain tract of land, but reserved the timber. The clause reserving the timber is as follows:

"Also saving and excepting all the timber growing, standing, or being upon said land, and the party of the first part reserves and is hereby given two years in which to remove said timber from said land, and also reserves the right to enter upon, over and across said land for the purpose of removing said timber."

The two-year period expired on August 9, 1907. The lower court held that the respondent was entitled to a rea-

¹Reported in 97 Pac. 292.

There is no statement of facts. The appellant relies entirely upon technical objections. His principal point is that the court erred in overruling his demurrer to the complaint. This point is the only one which we deem of sufficient merit to justify consideration. The complaint alleges that the plaintiffs "are the owners, and entitled to the immediate possession, of certain goods and chattels, of the value in cash of \$525.22, which personal property is more fully described and valued in exhibit A, attached to plaintiffs' affidavit in replevin, filed in this action; that defendant wrongfully retains said goods and chattels from the possession of plaintiffs, and has so detained them ever since the month of September, A. D., 1905, due demand being made therefor, to the damage of plaintiff in the sum of \$200." The demurrer to this complaint was upon the grounds that it failed to state a cause of action, and that the court is not shown thereby to have jurisdiction over the subject-matter. The demurrer was submitted without argument, and was overruled, and appellant then answered, making general denials.

It is argued that the complaint is fatally defective because it contains, "(1) no allegation of demand; (2) no allegation of ownership at the time of demand; (3) no description of the goods; and (4) no allegation of venue." It is true the complaint contains no allegation showing that the property was at that time located in Kitsap county, where the action was brought, and it is also the law that the court would have no jurisdiction over the subject-matter unless the property was within the jurisdiction of the court. But the appellant did not stand upon his demurrer. The jurisdictional facts could have been proved at the trial, and for aught that appears here, that fact, and all other necessary facts omitted from the complaint, were fully established by proofs at the trial. This court said, in *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879:

"The statute directs us to disregard any error or defect which does not affect a substantial right of the adverse party

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(§ 4957), and to determine all causes upon the merits thereof, disregarding all technicalities, and to consider all amendments which could have been made as made (§ 6535). When, therefore, a cause has been tried upon its merits, as if upon pleadings sufficient in form and substance, in which the complaining party has not been misled, and has had full opportunity to present his case, some substantial wrong, some failure on the part of his adversary to aver or prove a material matter necessary on his part to be averred and proven in order to entitle him to recover, must be shown, before this court is warranted in reversing and remanding a cause for a new trial. A mere defect in pleading is not such a cause. It must not only be defective, but must have operated to the substantial injury of the complainant before that result can follow."

In *Gritman v. United States Fidelity and Guaranty Co.*, 41 Wash. 77, 83 Pac. 6, we followed this rule, and added: "The same reasoning would prevent this court from dismissing the case after trial, even though the demurrer should have been sustained in the first instance." This rule has been followed in other cases. *Richardson v. Moore*, 30 Wash. 406, 71 Pac. 18; *Irby v. Phillips*, 40 Wash. 618, 82 Pac. 931; *Lang v. Crescent Coal Co.*, 44 Wash. 267, 87 Pac. 261; *Hester v. Stine*, 46 Wash. 469, 90 Pac. 594.

The appellant in this case does not appear to have been misled in any particular. He had a full opportunity to present the merits of his case to the court and the jury, and we have no doubt that, if any jurisdictional or other fact necessary to the respondents' cause was not fully established at the trial, the record would be here to show the error.

No prejudicial error appears here, and the judgment must therefore be affirmed.

HADLEY, C. J., CROW, and FULLERTON, JJ., concur.

RUDKIN and ROOT, JJ., took no part.

[No. 7387. Decided September 16, 1908.]

C. H. SQUIRES *et al.*, *Respondents*, v. JAMES HIGGINSON,
Respondent, THOMAS BOWES, *Appellant*.¹

CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD—EVIDENCE—SUFFICIENCY. A quitclaim is properly set aside for fraud, where it appears that the grantee represented to the nonresident owner, while on a visit to the city, that the lots were unimproved and of little value and that he had lost title through foreclosure and sale of taxes (which were long delinquent), and that the grantee was the tax title holder when in fact he was not interested therein, and knew that the lots were valuable and had been improved by parties in possession under void tax proceedings; that the owner had not seen the lots and relied upon such statements and was not acquainted with their value, and without seeing the lots or knowing of his rights, made the quitclaim of property worth \$700, in consideration of \$40, with intent to clear up the title of the holder of the tax deed.

Appeal from a judgment of the superior court for King county, Yakey, J., entered January 27, 1908, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

F. R. Conway, for appellant.

Todd, Wilson & Thorgrimson, for respondent Higginson.

MOUNT, J.—The plaintiffs brought this action to quiet title to a certain lot in Ballard, in King county. They allege title in themselves through a delinquent tax foreclosure and sale. The intervener Bowes was allowed to intervene in the action, and he denied the alleged claim of title of the plaintiffs, and set up title in himself by reason of a quitclaim deed from the defendant Higginson. Higginson denied the alleged title in the plaintiffs and in the intervener Bowes, and alleged the invalidity of the tax sale under which the plaintiffs claimed, and alleged that the quitclaim deed executed by him to Bowes was acquired by fraud and deceit and was

¹Reported in 97 Pac. 240.

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therefore void. He alleged title to the lot in himself, and prayed that his title be quieted.

At the trial, which was had to the court without a jury, it was conceded that the tax foreclosure under which the plaintiffs claimed was void, and it was stipulated between the plaintiffs and the defendant Higginson that the plaintiffs had placed betterments upon the property after July, 1903, to the value of \$1,400, and had paid taxes thereon amounting to \$125. The court found that the intervener Bowes had acquired title from the defendant Higginson by fraud and deceit; and a judgment was entered to the effect that the defendant should have his title quieted against the plaintiffs upon the payment of \$1,525 by defendant to plaintiffs for betterments and taxes, and that the quitclaim deed from defendant to the intervener be cancelled and set aside upon the return of \$40 paid by the intervener to the defendant Higginson as a consideration for the deed, and that title to the lot be quieted in the defendant. The intervener Bowes only has appealed.

He alleges several errors, but the only one we need to consider is whether the court erred in finding that the quitclaim deed under which he claims was obtained by fraud and deceit. The facts are, in substance, these: The defendant Higginson acquired title to the property in the year 1891. The following year he left Seattle and went to Abbotsford, in British Columbia, where he has ever since resided. He permitted the taxes to become delinquent upon the lot. In the year 1901, one Newcomer purchased a certificate of delinquency against the lot, and proceeded to foreclose the same. The action was prosecuted to judgment and sale. The judgment and sale were void because the summons was insufficient to give the court jurisdiction.

In January, 1907, the plaintiffs brought this action to quiet title. The intervener, about that time, learned of this action and of the defects in plaintiffs' title, and of the value

of the property, which at that time was about \$2,200. Bowes then wrote a letter to defendant Higginson at Abbotsford, in British Columbia, stating that Higginson had lost his title to the lot by reason of foreclosure proceedings for delinquent taxes, and made an offer of \$25 for a quitclaim deed to clear up the title. Higginson then came to Seattle, and without looking at the lot, knowing its value, or knowing of the pendency of the action, saw Bowes, who told him that he had lost his title, that he (Bowes) was the owner of the tax title, that the property was unimproved and of very little value, and that, in order to avoid a lawsuit to clear up his title, he would give Higginson \$35 for a quitclaim deed, \$10 being for Higginson's railroad fare from British Columbia to Seattle.

Higginson had not seen the property for about sixteen years. He knew nothing of its value or the improvements thereon, and believed it had been sold for taxes because he had paid no taxes since about 1895. Being in ignorance of the facts, he believed and relied upon the statements made to him by Bowes, and executed a quitclaim deed to Bowes, the deed naming the consideration as \$40, \$5 having been paid for preparing the deed. Higginson testified that he did not intend to execute, and would not have executed, a deed to any one but the holder of the tax title, and did so for the purpose of clearing up the title in the hands of the purchaser at the tax sale. Upon receipt of the quitclaim deed from Higginson, Bowes filed his application, and was allowed to intervene in this action before Higginson knew of the suit.

It is claimed by the appellant that he and the defendant Higginson were dealing at arm's length, and that the latter therefore had no right to rely on his statements or representations. But we think the court was clearly right in setting aside the deed. Higginson was unacquainted with the lot, or its value, or the condition of the title. He believed he had lost the title through tax foreclosure proceedings, and that

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Bowes was the holder of the tax title. It is true he might have learned the value of the lot and the fact that it had been improved by going and looking at it, and he might have examined the record and learned that the tax foreclosure was void. But he was not a lawyer; he was a farmer, and in all probability with an examination of the record he would have acquired no knowledge of the validity of the tax sale. Bowes knew all about it. He was engaged in purchasing tax titles. He knew of defendant's ignorance, and misrepresented all the facts to him; particularly he misrepresented that he was the holder of the tax title, on account of which defendant Higginson executed the deed. Bowes took advantage of his own knowledge and of defendant's ignorance and misrepresented the facts and thereby induced defendant to accept \$40 for property at that time worth \$700 without the improvements. We think it cannot be held under these circumstances that the parties here were dealing at arm's length or that Higginson might not rely upon appellant's representations. The appellant acquired the deed by deceit and fraud and for an inadequate consideration.

The judgment appears to be right, and is therefore affirmed.

HADLEY, C. J., CROW, and ROOT, JJ., concur.

[No. 7385. Decided September 16, 1908.]

J. B. JOHNSON, *Appellant*, v. MARCELLUS LARA *et al.*,
Respondents.¹

SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—CONTRACTS—TERMINATION—WAIVER OF RIGHTS BY REJECTING TITLE. Where a contract to convey land provided that, if the vendors could not make a marketable title within a specified time after objections pointed out by the vendee, "the contract shall terminate and be at an end," the vendee is not entitled to specific performance after refusing to accept the title offered and insisting upon objections to the title in particulars which the vendors could not and would not make good, six months after the vendors had, for that reason, rescinded the contract; since his right to specific performance terminated on his rejection of the title and rescission of the contract.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 9, 1908, dismissing upon the merits an action for specific performance, after a trial before the court without a jury. Affirmed.

Godman & Embree and *Farrell, Kane & Stratton*, for appellant.

James Kiefer and *John G. Barnes*, for respondents.

MOUNT, J.—This action was brought by the plaintiff to enforce specific performance of a contract for the purchase of two hundred and sixty-seven acres of land in King county. After issues were joined, the cause was tried to the court. No findings of fact were made, but the action was dismissed as to plaintiff, and a decree quieting defendants' title was entered. The plaintiff appeals.

It appears that respondents Lara and wife were, on September 15, 1906, the owners of the land in question. On that date they entered into a written contract with the appellant Johnson, whereby they agreed to sell and convey to Johnson the lands in controversy for the price of \$50,000.

¹Reported in 97 Pac. 231.

At the time the contract was signed, Johnson paid \$500 on the purchase price. The contract provided that the vendors Lara and wife should furnish to the vendee an abstract of title, and that the vendee should have twenty days thereafter to examine the same and notify the vendors of any defects or objections to the title of the land. The contract also provided as follows:

"In the event the title to said property or any part thereof is not good, marketable and merchantable, or is not made good, marketable and merchantable by the said first parties (Lara and wife) within a reasonable time after objections to such title have been pointed out as aforesaid by the second party (Johnson) his heirs or assigns, then the said first party shall, upon demand therefor, pay back to the said second party, his heirs or assigns, the said sum of \$500, and in that event this contract shall terminate and be at an end."

After this contract was entered into, the respondents Lara and wife had an abstract of title prepared, and the same was delivered to appellant. Thereafter, and within twenty days, the abstract was examined and forty-six objections were made to the title by appellant. On October 10, 1906, the appellant and respondent Marcellus Lara met and considered the objections made to the title. The evidence is in conflict as to all that transpired at this meeting. It is clear, however, that the respondent Lara insisted that the title was good, with the exception of two certain mortgages and an option contract which he agreed to release, and that the other objections were frivolous; that it would be impossible for him to meet them; and that he could not and would not do so. It is also clear that the appellant insisted on many objections and that the title was not good and was not satisfactory to him. Thereupon the respondent Lara notified appellant that, unless he paid the balance due in ten days as provided by the contract, the contract would be forfeited. The respondent, after the expiration of ten days, treated the contract as at an end. On February 18, 1907, the respondents Lara and

wife sold and conveyed the property to the respondent Seattle Country Club, for \$54,000. Thereafter on April 19, 1907, the appellant tendered to Lara and wife the balance of the purchase price according to his contract, and demanded a conveyance of the title to him, which respondent Lara refused. This action was thereupon begun against Lara and wife and the Seattle Country Club.

The trial court was evidently of the opinion that the contract was rescinded at the meeting which occurred on October 10, 1906, and for that reason dismissed the action. We think the evidence justifies that conclusion. The evidence clearly shows that the appellant was not satisfied with the title which was offered to him, and which respondent declared was out of his power to make better at that time. Whether the title was good, marketable, or merchantable we need not now consider, because the appellant refused it and respondents are not seeking to force him to accept it. The appellant is now seeking to compel respondent Lara to convey a title which on October 10, 1906, he refused to accept. This cannot be done. *Allen v. Treat*, 48 Wash. 552, 94 Pac. 102.

The contract as above quoted provided that, after objections to the title had been pointed out by the appellant, if respondent Lara would not make the same marketable within a reasonable time, then upon demand Lara should repay the \$500 and "this contract shall terminate and be at an end." It is true that there is no evidence that appellant demanded the return of the \$500, but this was not necessary. The fact that the title was not good and the refusal of Lara to make it good were the facts which permitted appellant to terminate the contract. It may be true, as argued by the appellant, that this provision was for his benefit, but when he rejected the title and thereupon exercised the option to rescind the contract, his right to specifically enforce it also terminated. No express words of rescission by the appellant were necessary. His conduct at that time in refusing the title, and the fact

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that he did nothing and said nothing to Lara thereafter for a period of more than six months until the respondent Lara and wife had sold the property to the Seattle Country Club, was sufficient; and the further fact, which appears in the evidence, that the appellant told certain officers of the country club in substance that he did not expect to acquire title to the land by this action but wanted to make trouble for Lara, indicates quite clearly that this action was not brought in good faith. It is probable under the facts shown here that the appellant may recover his money back in an appropriate action therefor, but that is the extent of his rights.

We find no error in the record, and the judgment is therefore affirmed.

ROOT, CROW, and RUDKIN, JJ., concur.

HADLEY, C. J., and FULLERTON, J., took no part.

[No. 7268. Decided September 16, 1908.]

CLARK O'BRYAN, *Appellant*, v. AMERICAN INVESTMENT & IMPROVEMENT COMPANY *et al.*, *Respondents*.¹

JUDGMENTS—ENTRY—MODIFICATION. Where it is conceded that it was the intention of the trial judge to dismiss an action without prejudice, it is error to refuse to modify a judgment which is doubtful in that respect so that its meaning will be clear.

SAME—PROCEDURE—POWER OF COURT. Since the court has inherent power to modify a judgment entry to make it conform to the judgment actually entered, independent of any statute, it is not material under what statute the party seeks relief.

SAME—DISCRETION—APPEAL—REVIEW. The modification of a judgment entry to make it conform to the judgment actually entered is not a matter of discretion, but an imperative duty, the denial of which may be reviewed on appeal.

Appeal from an order of the superior court for King county, Albertson, J., entered February 6, 1908, denying an application to modify a judgment, after a hearing upon affidavits. Reversed.

¹Reported in 97 Pac. 241.

Geo. McKay and Alfred E. Hodgson, for appellant.

Hammond & Hammond, Blaine, Tucker & Hyland, and Walker & Munn, for respondents.

FULLERTON, J.—The appellant, as a stockholder of the respondent corporation, began this action on behalf of himself and all other stockholders similarly situated who might come into the action, to set aside certain deeds to real property purported to have been executed by the corporation to the defendant D. H. Lee, and from Lee to defendant Whalley, and for a reconveyance of the property to the corporation; also, to require an accounting from Lee, and other officers of the corporation, of the property of the corporation, and for the appointment of a receiver to take charge of the affairs of the corporation, and for general relief. D. H. Lee and the corporation made answer to the complaint containing both denials and new matter. To the new matter a reply was filed. Whether any others of the defendants made answer, the record brought to this court does not show. Subsequently a hearing was had before the court, and an order made which the clerk recorded in his minute book under date of October 8, 1907, in the following language: "Defendant's motion to cancel and discharge *lis pendens* is denied. The court directs dismissal of the action as to defendant company without prejudice."

On October 23, 1907, the following order was filed and entered:

"The above entitled action having come on duly and regularly for hearing and trial in open court this 5th day of September, 1907, the plaintiff appearing in person and by Messrs. Sachs & Hale, his attorneys, the defendant W. W. Whipple appearing by Messrs. Holcomb & Kirkpatrick, his attorneys, and the defendants American Investment & Improvement Company and D. H. Lee appearing in person and by their attorneys, Messrs. Hammond & Hammond and Messrs. Blaine, Tucker & Hyland, and the court having heard the evidence of the respective witnesses and the argu-

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ment of counsel, said action having been finally submitted to the court and the court being fully advised in the premises;

"Now THEREFORE, it is considered, ordered, adjudged and decreed that the above entitled action be, and the same hereby is, dismissed and that the defendants American Investment & Improvement Company and D. H. Lee are entitled to recover their costs of and from the plaintiff herein.

"Done in open court this 23 day of October, 1907. R. B. Albertson, Judge.

"To all of which plaintiff by his counsel, and the defendant W. W. Whipple by his counsel, excepted and said exceptions are hereby allowed. R. B. Albertson, Judge.

"O. K. as to form. Sachs & Hale."

On February 4, 1908, the appellant appeared by other counsel, who had been theretofore formally substituted, and petitioned for a modification of the judgment so as to make it conform to what he conceived to be the order of the court, as recorded in the minutes of the clerk under date of October 8, 1907. Affidavits in support of the motion were filed with it. The defendants opposed the motion, filing in support thereof the affidavit of one of their attorneys reciting the proceedings had at the time the formal order of dismissal was entered. At the hearing the court declined to modify the judgment, and the plaintiff appeals.

That it was the intention of the trial court to dismiss the pending action without prejudice to the right of the plaintiff to institute another for the same cause, seems to be agreed by all of the parties and by the trial judge as well. We can see no reason, therefore, why the judgment entry should not be amended so as to make it conform to that intent. As it stands now, it is at best doubtful whether it does so, and it is not to the best interest of litigants, nor is it the policy of the law, that these entries be left uncertain as to their meaning when it is within the power of the court to make them certain.

It is suggested, however, that the application to modify is made under the provision of chapter 17, title 28, of the

Code (Ballinger's), and the ground recited in the petition for the modification of the judgment is not one of the grounds therein enumerated. But the petition states a ground for modification under Bal. Code, § 4953 (P. C. § 424), and we have held that a party may have relief under this section even though the application be made by petition pursuant to the practice outlined in the chapter of the code above cited. *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103. But this question is of but little moment here. The superior court has inherent power, independent of statute, to so modify its judgment entry as to make it conform to the judgment actually entered, at any time when to do so will not affect substantial rights of innocent third persons who have acted on the faith of the entry.

Again it is said that applications to modify a judgment are addressed to the sound discretion of the trial court, and its order made therein will not be corrected by the appellate court except for manifest abuse. This is true, no doubt, where the application is based upon a ground involving a matter of discretion, but no discretion is involved in the correction of an entry which concededly does not speak the judgment of the court. To correct such an order is an imperative duty when no innocent third person will suffer thereby.

The judgment appealed from is reversed, and the cause remanded to correct the judgment entry in accordance with the application of the appellant.

HADLEY, C. J., CROW, and RUDKIN, JJ., concur.

ROOT and MOUNT, JJ., took no part.

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Opinion Per Curiam.

[No. 7191. Decided September 18, 1908.]

IONA WAREHOUSE COMPANY, *Appellant*, v. OTTO
VAN BUREN, *Respondent*.¹

CORPORATIONS—REPRESENTATIONS—AUTHORITY OF MANAGER—RATIFICATION. Upon conflicting evidence of witnesses as to the authority of a managing agent of a corporation to purchase wheat and hold the same for an advance price, his authority so to do is established where it appears from bank books and other documents that he had continually been doing business in that way for two years, to the knowledge of the stockholders and officers, and that no complaint was made until it was found that a loss would be sustained through a fall in the market.

Appeal from a judgment of the superior court for Adams county, Warren, J., entered April 20, 1907, upon findings in favor of the defendant, after a trial before the court without a jury, in an action for an accounting. Affirmed.

Lovell & Davis, for appellant.

O. R. Holcomb, for respondent.

PER CURIAM.—The plaintiff, Iona Warehouse Company, a corporation, has been engaged in the business of buying, selling, and shipping wheat prior to, and during the years 1905 and 1906, at Iona, in Adams county. Early in the year 1905, it employed the defendant, Otto Van Buren, as its managing agent to conduct its business, which he did until February, 1906. He purchased and sold wheat, transacted all business of the corporation, made collections, deposited its funds in the Pioneer State Bank at Ritzville, drew and signed its checks, conducted its correspondence, kept its books of account, and in fact was, under the authority of the board of directors, in full and complete charge of all of plaintiff's business affairs. He, from time to time, purchased wheat in large quantities from various persons, some of whom were stockholders, directors, and officers of the plaintiff corpora-

¹Reported in 97 Pac. 291.

tion. Much of this wheat was held by the defendant at plaintiff's warehouse for an advance in price, instead of being immediately sold. Wheat fell in price, with the result that a considerable loss was incurred. Thereupon the plaintiff, claiming the defendant had violated his instructions and had incurred loss by holding the wheat instead of making immediate sales, commenced this action for an accounting, demanding judgment against him in the sum of \$4,600. The defendant denied any neglect of duty, wrongful acts, or liability on his part. The cause was, upon stipulation, referred to the court commissioner to take and report evidence. Upon consideration of the evidence and exhibits so reported, the trial judge entered judgment in favor of the defendant, dismissing the action. The plaintiff has appealed.

The controlling question before us is whether the respondent, Van Buren, acted in excess or violation of his authority in holding the wheat so that the same might be sold at an advance on a rising market. Upon this issue, the evidence was in sharp conflict. A number of appellant's officers and stockholders testified that the respondent was instructed to make sales of all wheat purchased on the respective dates of purchase, but that he had violated such instructions. This the respondent denied. By stipulation all the bank books, check books, bank statements, letters, books of account, and other documents pertaining to appellant's business were introduced in evidence as exhibits, and the originals are now before us for our consideration.

The respondent not only contends that he was authorized by the appellant to conduct its business in the manner in which it was conducted, but that the stockholders, directors, and officers had actual knowledge of his acts, and by their acquiescence ratified the same. This contention was rightfully sustained by the trial court. The evidence shows that the appellant had conducted the same business during preceding years, and that respondent had previously represented

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it. The bank books show that, throughout all the years the appellant had been doing business, including 1905 and 1906, large overdrafts had been continually carried by it at the Pioneer State Bank. Other documents and books positively establish the fact that these overdrafts were caused by disbursements of funds in the purchase of wheat, which funds were not replaced by immediate sales. Appellant's books of account show that continually, from month to month, it made payments of interest to the bank on these large overdrafts. The appellant made no complaint to respondent of this method of transacting business until the season was about over and it became apparent that a loss would be sustained. From the indisputable documentary evidence now before us, we conclude that the trial judge was right in finding in favor of the respondent.

The judgment is affirmed.

[No. 7250. Decided September 18, 1908.]

IRA G. PRESTON, *Appellant*, v. HILL-WILSON SHINGLE
COMPANY, *Respondent*.¹

WITNESSES—COMPETENCY—TRANSACTION WITH DECEASED. In an action to enjoin the removal of timber sold by plaintiff to one M., who sold the same to defendants, brought after the death of M., the plaintiff is incompetent to testify to the transaction between himself and M. upon an issue as to the terms of the contract, under Bal. Code, § 5991, prohibiting testimony by a party in interest as to transactions had with a deceased person.

CONTRACTS—REFORMATION—MISTAKE—EVIDENCE—SUFFICIENCY. Where a written contract for the sale of timber omitted to specify any time for its removal, reformation of the same is warranted where the only evidence as to the agreement of the parties on this point was that of the scrivener who reduced the contract to writing, and he testified that the parties agreed to give ten years for the removal of the timber, but that by mistake he omitted to insert that clause in the writing.

¹Reported in 97 Pac. 293.

SAME—RELIEF GRANTED—JUDGMENT. Where, in an action to enjoin the removal of timber, defendant establishes his right to have the contract reformed to include a clause, omitted by mistake, giving him ten years in which to remove the same (two years of which has not yet expired) it is error to enter judgment requiring removal of the timber within a reasonable time after notice, as in the case of a contract failing to specify any time; but the contract should be reformed, requiring removal at any time within the period agreed upon.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered September 17, 1907, upon findings in favor of the defendant, after a trial before the court without a jury, in an action for an injunction. Modified.

Hathaway & Alston, for appellant.

H. G. & Dix H. Rowland (Bell & Austin, of counsel), for respondent.

MOUNT, J.—This action was brought by the appellant to enjoin the respondent from cutting and removing timber from appellant's lands. For answer to the complaint, the defendant admitted the ownership of the land in plaintiff, and that it intended to go upon the land and remove the timber therefrom, and also set up three affirmative defenses, to the effect, (1) that on January 19, 1900, the plaintiff, by an agreement in writing, for a consideration of \$350 paid to her, sold to one W. J. Morgan all the timber upon said land, except such as might be needed for outbuildings and fences, that defendant subsequently purchased the said timber from said Morgan, and that the time within which the timber should be removed had not expired. (2) In addition to the facts stated above, the answer alleged that the plaintiff had knowledge of the sale and conveyance of said timber to the defendant for more than six years, and had acquiesced therein, and is now estopped from claiming said timber; and (3) that by mutual mistake no time limit was fixed by the written

contract of sale entered into between the plaintiff and Mr. Morgan, but that the agreement was that said Morgan and his assigns should have ten years within which to remove said timber, and that the same was by a mistake omitted from the written contract, and that after the instrument had been executed the scrivener had inserted therein the provision for the removal of the timber within ten years; and defendant prayed that the written contract be reformed to conform to the facts, and that defendant's title to the timber be quieted.

In reply, the plaintiff denied generally all the allegations of new matter contained in the answer. The cause was tried to the court without a jury, and findings were made substantially in accord with the answer. Thereupon a judgment was entered denying injunctive relief to the plaintiff, but adjudging that the defendant was the owner of the timber, except such as may be needed by plaintiff for outbuildings and fences, and that defendant had a lawful right to enter upon and cut and remove timber for a reasonable time after notice to remove the same. The plaintiff appeals from the judgment, and argues three points, which we shall notice in order.

(1) During the trial the defendant called the scrivener as a witness, who testified, that he reduced the contract of sale between the plaintiff and W. J. Morgan to writing, and that the parties agreed upon ten years' time for Morgan to remove the timber; that, when he wrote out the agreement, he forgot to insert that clause, and that the omission was not noticed when the contract was signed and acknowledged by the parties; that, a short time after the contract was signed and after the plaintiff had gone, the attention of the scrivener was called to the omission, and that he then inserted the provision without permission of the plaintiff. It also appeared that Mr. Morgan died some time after the execution of the contract, and before the defendant purchased the interest of his estate in the timber. After the scrivener had so testified, the plaintiff was called as a witness and questioned about the

transaction between himself and the deceased. This testimony was excluded. The witness came clearly within the terms of the statute, Bal. Code, § 5991 (P. C. § 937), and was, therefore, incompetent to testify to any transaction had between him and the deceased. *O'Connor v. Slatter*, 48 Wash. 493, 93 Pac. 1078.

(2) It is argued by the appellant that the evidence does not justify a reformation of the written instrument. The evidence, as we read it, is all one way upon this question, and we think it hardly admits of doubt that the parties to the original contract agreed and intended to limit the time to ten years from January 19, 1900, within which the timber should be removed from the land, and that this clause was omitted by mistake. The court therefore did not err in reforming the instrument accordingly.

(3) The next question argued is that, in an instrument conveying timber when no time is mentioned within which the timber must be removed from the land, the grantee has only reasonable time within which to remove the timber. In view of the holding above, that the instrument in question was properly reformed so as to fix a definite time for the removal of the timber, it is unnecessary to discuss the last question, because with the expiration of the ten-year period the title of the timber not cut reverts to the grantor. *Lehtonen v. Marysville Water & Power Co.*, ante p. 359, 97 Pac. 292.

The judgment is therefore modified so as to authorize the respondent to cut and remove timber from the land in question until January 20, 1910. The appellant to recover costs.

HADLEY, C. J., FULLERTON, ROOT, and RUDKIN, JJ., concur.

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[No. 7170. Decided September 18, 1908.]

NELLIE KELSO *et al.*, Respondents, v. AMERICAN INVESTMENT & IMPROVEMENT COMPANY *et al.*, Appellants.¹

CORPORATIONS — INSOLVENCY — RECEIVERS — FRAUDULENT CONVEYANCES. A receiver is properly appointed for an insolvent corporation, at the suit of creditors, and the complaint states a cause of action, where it appears that it was, from its inception, a fraudulent scheme on the part of its promoter, that it fraudulently assumed to make sales of property to the plaintiffs without having any title, and that it was without any assets and had conveyed to its promoter and chief stockholder all its property with intent to defraud its creditors.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 19, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury. Affirmed.

Hammond & Hammond, Blaine, Tucker & Hyland, S. M. Brackett, and Walker & Munn (W. W. Wilshire, of counsel), for appellants American Investment & Improvement Company and D. H. Lee.

William W. Wilshire, for appellants Fidelity & Deposit Company and Whalley.

Roberts & Hulbert, for respondents.

HADLEY, C. J.—This is an action brought by the creditors of the American Investment & Improvement Company, against that company and others, for the purpose of setting aside certain conveyances of real estate made by that corporation, and also to procure the appointment of a receiver for the company. Some of the complainants are judgment creditors, and some are contract holders for the purchase of real estate from the corporation. Other persons are made codefendants with the corporation because of interests which they assert against the land.

¹Reported in 97 Pac. 294.

The complaint is very long and charges many things, among them, the following: That the defendant D. H. Lee, as president of the corporation, caused the corporation, by contract, to agree to convey to himself and one J. R. Young certain land belonging to the company, consisting of about one hundred and fifty-seven acres; that afterwards Whipple, one of the plaintiffs in this cause, bought the interest of Young, and the property was then platted into blocks but not into lots, and known as "Lakeside City"; that afterwards the corporation caused this land to be conveyed to the defendant D. C. Young; that later the defendant D. H. Lee, as president of the corporation, caused all of the remainder of the real estate belonging to the corporation to be conveyed to himself; that the conveyance was without any consideration, was fraudulent and void as to all the stockholders and creditors of the corporation, and was made by the corporation and its president for the express purpose of cheating and defrauding the creditors and all of the stockholders thereof except said defendant Lee; that Lee, having in his control the entire management of said corporation, has caused all the assets thereof to be wrongfully and fraudulently transferred, leaving no property of any character standing in the name of the corporation; that the corporation has represented, and is representing, that it has caused plats to be filed upon the lands mentioned, comprising three separate additions, but that no such plats have been filed, and that sales to many persons have been wrongfully and fraudulently made by reason of such representations; that most of the sales have been made upon contracts, the purchasers paying certain sums in cash and agreeing to pay the remainder in installments, and the contracts contain a clause that, upon failure to make each payment promptly, the person so failing forfeits all money already paid; that the defendants D. H. Lee and his son R. H. Lee are collecting those payments from month to month, applying the proceeds to their own use, and refusing to pay the just claims

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against the corporation. The contracts of certain holders who are parties to this suit are particularly described and specified, and it is alleged that, after paying or tendering the whole amount due and demanding deeds of conveyance, the same were refused, and that the purchasers have been unable to acquire title to the property.

It is further alleged that the corporation is wholly unable to make deeds of conveyance to any of such purchasers, for the reason that it has no title to the property, and for the further reason that the land is incumbered by mortgages now in process of foreclosure; that the contract holders have no adequate remedy unless a receiver is appointed to administer the affairs of the corporation and cause its assets to be re-conveyed to it. The prayer of the complaint is that a receiver shall be appointed, and that the conveyance hereinbefore specified as having been made to D. C. Young, and also that to D. H. Lee, shall be cancelled and set aside.

A temporary receiver was appointed, and he was later permitted to file a petition in the action in the nature of an intervention. Other parties also intervened. The various pleadings between all the parties are very long and complicated, and we do not find it necessary to undertake a statement of them here. The cause was tried by the court without a jury, and the court entered findings of facts and conclusions of law.

We believe the most direct way to place before the reader a more full understanding of the case is to state somewhat in detail the more material and numerous facts as found by the court. In substance, they are as follows: That certain plaintiffs are contract holders such as described in the complaint, and that certain others are judgment creditors; that the plaintiff Whipple claims the right to purchase about one hundred and fifty-eight acres of the property involved in the deed of conveyance to D. C. Young; that the defendant O'Bryan has filed a cross-complaint, claiming to be the owner of twelve hundred shares of the capital stock of said corporation, of the par value of \$120,000, and he asks to have the

conveyances to D. H. Lee and D. C. Young set aside, and prays the appointment of a receiver; that the corporation purports to have been organized with a capital stock of \$10,000,000, which it is claimed was fully paid by the offer to transfer to the company certain oil claims or lands in the Kayak district, in Alaska; that the lands were merely locations upon which it was necessary to do assessment work in order to preserve the rights of the owners; that such assessment work has never been done, and the claims do not appear to have been of any value, but are worthless; that ninety-nine thousand nine hundred and ninety-eight shares of the capital stock of the corporation appear to have been issued to one McFaul in consideration of his offer to transfer these oil lands in Alaska; that there is no evidence that the oil lands were transferred to the corporation; that upon the same day the entire capital stock of the corporation was issued to the defendant D. H. Lee, there being a total issue to him of one hundred thousand shares; that the shares issued to McFaul were by him immediately surrendered, and they were at once reissued to Lee; that the corporation received no consideration for its capital stock, except the sum of \$200 paid for two shares of stock by Lee and one Smith, and possibly a certain other sum for stock which was delivered to Knight and Williams as part of the purchase price of property, which question the court declined to determine in this case; that D. H. Lee was at all times the president and general manager of the corporation, and during most of the time held the office of treasurer or assistant treasurer; that he was at all times a member of its board of trustees, was the promoter of the enterprise, was at all times the leading and directing spirit in the corporation, and exercised complete control and dominion over the corporation and its officers, the other so-called directors being mere dummies; that, with the corporation having no assets excepting oil lands which are of no value, it entered into a contract with Knight and Williams for the purchase of certain land, which contract was in the nature of

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an option whereby the corporation agreed to pay one dollar in cash and six hundred shares of the capital stock of the company, of the par value of \$60,000, and a mortgage in the sum of \$15,000; that afterwards the corporation entered into a contract to purchase from the Robertson Mortgage Company a certain tract of land for the consideration of \$4,000, the corporation still having no money or means with which to pay for any property; that it then entered into a contract with Knight and Williams whereby the latter agreed, for a consideration of \$2,000 to be paid to them and a further issue to them of six hundred shares of the capital stock of the corporation, of the par value of \$60,000, to release a part of the property from their contract and mortgage; that thereupon the corporation executed and delivered to the mortgage company a mortgage for \$7,500 upon all the land purchased from the mortgage company and all that part of the Knight and Williams land released by the latter, the mortgage company retaining from the amount of the mortgage \$4,000 to pay for its land, and delivering to the corporation the sum of \$3,500; that, after said property was acquired by the corporation, it proceeded to advertise the same and offer it for sale upon the market as having been duly platted, offering to purchasers to furnish clear title and free abstracts, and sales were made to a large number of innocent purchasers; that at all of said times the land was covered by the mortgages above mentioned, and in addition thereto a second mortgage was given to Knight and Williams in the sum of \$3,000; that about November 20, 1905, the corporation purports to have sold by contract to Lee, its president, and one J. R. Young about one hundred and fifty-eight acres of said land, being all that part of it now known as Lakeside City, and the plaintiff Whipple now claims as the assignee of J. R. Young to have the right thereunder to purchase the whole tract; that the land was not platted as represented by Lee at the time of making sales to various purchasers, but a plat

was filed of Lakeside City in blocks but never in lots as it was sold; that, since the beginning of this suit, Lee procured to be filed a plat of Lakeside City; that the corporation also acquired by purchase from the state of Washington certain shore lands lying in front of the above mentioned lands; that in May, 1906, Lee caused the corporation to execute and deliver to himself a deed of conveyance whereby the attempt was made to convey to him certain of the uplands and shore lands, the consideration stated in the deed being \$110,000; that, by resolution of the same date, Lee and the corporation caused to be conveyed to D. C. Young certain other of the lands above mentioned, for an alleged consideration of \$30,000; that, at the time of the execution of said deeds, they are alleged to have conveyed all the property belonging to the corporation; that the corporation had no personal property, no office furniture or fixtures, no cash in hand, and if said conveyances shall stand as legal and valid, it leaves the corporation without any assets of any kind; that, according to the testimony of the officers of the corporation, no books of account were ever kept and no bills or vouchers or itemized statements of account can now be found or produced; that the mortgages upon said property have not been paid and a suit is now pending to foreclose the two mortgages originally given to Knight and Williams; that other creditors of the corporation are unpaid and other suits are pending which affect the land; that the deeds to D. H. Lee and D. C. Young were made without any authority on the part of the corporation, and without any consideration moving from the grantees therein to the corporation, and they were at all times fraudulent and void; that all the purchasers and contract holders have an interest either in the land which they contracted to purchase, or in having the money which they have paid returned to them in case title to the land cannot be obtained; that, in the last-named event, they should be held to be creditors of the corporation to the extent of the amounts which they have paid; that their claims are wholly

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unsettled and no provision has been made for obtaining or perfecting title for them.

It was further found that no appeal was ever prosecuted by the said corporation in the case of W. W. Whipple against D. H. Lee and the corporation, and that no notice of appeal in said cause was ever given on behalf of the corporation, no appeal bond was ever executed in its behalf, and it was in no way joined in the appeal; that the corporation was not benefited by the appeal taken in that case by D. H. Lee as an individual, and it was in no way interested in the execution of a certain deed of trust for a part of the land above mentioned to the Fidelity & Deposit Company of Maryland and John A. Whalley, which deed of trust was intended as an indemnity to said surety company for furnishing an appeal and supersedeas bond in the appeal mentioned; that no resolution was ever passed by the trustees of the corporation authorizing the execution of the trust deed, and no authority for its execution existed; that the trust deed contained a provision to the effect that when its conditions should have been performed the property should be reconveyed, not to the corporation, but to D. H. Lee individually; that the agents and representatives of said surety company had sufficient knowledge as to the true condition of said corporation, and the relation of D. H. Lee to the same, to have placed them upon guard and to have required a more full and thorough investigation of the corporation's affairs and its relation to Lee; that Lee dominated and controlled the corporation and caused the trust deed to be made solely in his own interest, and his act was without authority as against the corporation.

From the foregoing facts, the court concluded that the deeds from the American Investment & Improvement Company to D. H. Lee and D. C. Young are void in law, and that the plaintiffs in this suit, and also the receiver upon his petition of intervention in the cause, are entitled to have a decree setting aside the deeds, and to have all the property therein

described reconveyed to the corporation, including the shore lands; that the deed of trust, purporting to have been executed by the corporation and D. H. Lee to the Fidelity & Deposit Company of Maryland and John A. Whalley, is of no force and effect as against the corporation, and that the Fidelity & Deposit Company of Maryland and John A. Whalley should be decreed to have no right, title, or interest of any kind in said land, and that the title of the corporation should be quieted as against them; that the previous appointment of a temporary receiver in the cause was proper, and that the appointment should now be made permanent; that a receiver should be appointed to take charge of all the property and assets of the corporation, who shall administer its affairs under the orders and directions of the court. Such a decree was entered, and the American Investment & Improvement Company and D. H. Lee have jointly appealed. The Fidelity & Deposit Company of Maryland and John A. Whalley have also joined in an appeal.

The record in the cause is a very tedious one, comprising hundreds of pages, by which the various contentions as made in the trial court are brought here. The writer has spent much time in reading the record; but in view of what has already been stated from it, we believe that no extended discussion here is necessary. The history of the management of the corporation is somewhat remarkable, and sufficiently speaks for itself to make comment upon the facts unnecessary. It is contended that the demurrers to the complaint should have been sustained; but we think, from our statement of the averments contained in the complaint, it is manifest that a cause of action was stated calling for the setting aside of the conveyances and also for the appointment of a receiver. The interests of the contract holders and the judgment creditor as plaintiffs are sufficient under all the averments to warrant them in asking the relief sought against conveyances which fraudulently transferred the corporate assets, leaving nothing to pay their claims. The allegations also show an insol-

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vent condition of the corporation, if the conveyances attached are permitted to stand, and in any event, even if not permitted to stand, the averments as to bad faith on the part of those controlling the stock and policy of the corporation, and also as to the generally confused and complicated condition of corporate affairs, show that the corporation is in imminent danger of insolvency. The complaint, therefore, showed ground for a receivership under our statute, Bal. Code, § 5456 (P. C. § 575).

We think the findings of the court, as we have stated them in substance, are well sustained by the evidence, and we shall not disturb them, as we discover no prejudicial error in the trial of the cause. The conclusions which the court reached, and the decree which it rendered, in all respects followed from the facts. The judgment is therefore affirmed.

CROW, FULLERTON, and RUDKIN, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 7152. Decided September 19, 1908.]

T. F. SULLY *et al.*, *Appellants*, v. JOHN BUSHELL,
Respondent.¹

GARNISHMENT—DISCHARGE—ISSUING—SUFFICIENCY. Garnishments issued upon the ground that defendant was about to dispose of his property with intent to defraud creditors, and was guilty of a fraud in contracting the debt, are properly discharged as improperly issued, where it appears upon a showing by affidavits, that the defendant, a long-time resident of the county, was a man of means, without creditors, and able to pay plaintiff's claim, and denied that he was about to dispose of his property.

Appeal from an order of the superior court for King county, Frater, J., entered September 28, 1907, discharging attachments after a hearing upon affidavits before the court. Affirmed.

¹Reported in 97 Pac. 445.

W. F. Hays and Shepard & Flett, for appellants.

Smith & Cole, for respondent.

Root, J.—This was an action for damages alleged to have been caused by the breaking of a contract to sell a certain leasehold right. Appellants, at the time of the commencement of the action, applied for a writ of attachment, upon two grounds, to wit: (a) That the defendant was about to assign his property with intent to defraud his creditors; (b) that the defendant had been guilty of fraud in contracting the debt, etc. They also sued out a writ of garnishment. The writ of attachment was not issued. Respondent interposed a motion to discharge the writ of garnishment, upon the ground that the same was improperly and illegally issued. This motion came on to be heard before the court upon affidavits. Whereupon the court made and entered its order discharging both writs. From this order the present appeal is prosecuted.

The affidavits of respondent controverted the allegations of fraud as to the contracting of the obligation, and denied that he was about to assign his property with intent to defraud his creditors, and tended to show that the respondent was a man of means, a long-time resident of the county wherein he was then residing, that he owed no debts, had no creditors, and was financially able to respond to any judgment that appellants might recover against him. The trial court found that the writ had been improperly and illegally issued, and we think its conclusion was justified by the showing made. The judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, RUDKIN, and CROW, JJ., concur.

[No. 7235. Decided September 19, 1908.]

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondent*,
v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY,
Appellant.¹

JUDGMENTS—CONCLUSIVENESS—VACATION. Judgments which had been vacated by a mutual agreement of the parties are not *res judicata* of the questions determined.

JUDGMENTS—RECITALS — EVIDENCE — COMPETENCY. Judgments in favor of a corporation containing recitals of want of authority of certain officers, who were not authorized to represent it, are not competent evidence of such fact, after the judgments have been vacated.

APPEAL—BOND—EXECUTION. A bond on appeal given on behalf of the appellant is sufficient if executed by the surety alone.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 11, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action upon contract. Affirmed.

Sachs & Hale, for appellant.

William W. Wilshire, for respondent.

FULLERTON, J.—The respondent brought this action against the appellant to recover certain premiums or fees claimed to be due for becoming the appellant's surety upon three indemnity bonds which the appellant gave in actions pending against it. Two of such bonds were given in a case pending in the superior court of King county wherein one Egan was plaintiff and the appellant and others were defendants, the one for the sum of \$70,400 to supersede an order appointing a temporary receiver for the appellant, and the other for \$500, being the appeal bond on the appeal from the order appointing the receiver. The third bond was an appeal bond in the sum of \$500, given on an appeal from a decree and judgment, entered in the United States Circuit

¹Reported in 97 Pac. 453.

Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit, in an action in which one Crawford was plaintiff and the appellant was defendant.

The bonds in question were applied for and obtained on behalf of the corporation by certain persons who had possession of the corporate offices and corporate records, and who were acting as officers of the corporation, but who had been adjudged in the actions in which the appeals were taken to be in possession of the officers wrongfully for want of a due and proper election. The actions were not tried out in the appellate courts, but were settled and dismissed and the judgments vacated by the mutual agreement of the parties before they were ready to be heard by the appellate tribunals. In the course of the present trial, the respondent introduced the judgments in evidence, and when it rested its case, the appellant moved for a nonsuit, which being overruled, it rested its case on the respondent's evidence. On judgment going against it, it appealed.

The appellant relies upon these judgments as a defense to the present action. It contends that the recitals in these judgments must be taken as true in the present action, and since it was found that the persons who acted for the corporation in procuring the issuance of these bonds were not legally corporate officers, it follows that they had no authority to make contracts on behalf of the corporation; and that the respondent is bound thereby, since it had notice of the recitals in the judgments and cannot claim to have dealt with these persons as either *de facto* or *de jure* officers. But we are unable to understand how these judgments can have the effect the appellant would accord them. Since they have been vacated and set aside by the mutual agreement of the parties, they can no longer be held to be *res judicata* of the questions determined, even as between the parties themselves; much less can they be *res judicata* as to the respondent, who is a stranger to them. Nor are these vacated judgments

competent evidence in this case of the fact that these persons had no authority to represent the corporation in the transaction between the corporation and the respondent. They were competent to prove the fact for which the respondent introduced them; namely, to show that such judgments had been rendered, but they do not prove that the persons who were then representing the corporation as its officers were not its legal officers. As to this fact these recitals are but hearsay, and the original evidence should have been resorted to had the appellant desired to establish the fact.

The appellant contends, also, that the appellant did not furnish a competent bond in the state court—that is to say, a bond sufficient to perfect the appeal. The objection to the bond is that it was not signed by the principal on whose behalf it was given. But this is not necessary to a competent bond in this state. Under the statute as it now exists, an appeal bond is sufficient if given on behalf of the appellant when signed by the surety alone. *Bloomingtondale v. Weil*, 29 Wash. 611, 70 Pac. 94. See, also, *Dahl v. Tibbals*, 5 Wash. 259, 31 Pac. 868; *Cook v. Tibbals*, 12 Wash. 207, 40 Pac. 935; *Hill Estate Co. v. Whittlesey*, 21 Wash. 142, 57 Pac. 345; *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

RUDKIN and ROOT, JJ., took no part.

[No. 7135. Decided September 22, 1908.]

**J. G. CUNNINGHAM *et al.*, Respondents, v. GEORGE P. LAKIN,
Administrator *etc.*, Appellant.¹**

EXECUTORS AND ADMINISTRATORS — CLAIMS — EXPENSES OF LAST SICKNESS. Compensation for services of physicians, rendered to deceased during his last sickness, do not depend upon a contract with the deceased, but are given a preference right of payment over ordinary expenses of the estate, by Bal. Code, §§ 6333, 6335, 6336.

APPEAL—REVIEW—AMENDMENTS. In an action tried before the court without a jury, the superior court will on appeal consider the complaint amended to conform to the proofs.

APPEAL—RECORD—EVIDENCE. Findings as to the reasonableness of charges for a physician's services cannot be reviewed when the evidence is not brought up on appeal.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered September 7, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action for services. Affirmed.

C. L. Parker and E. P. Dole, for appellant.

Kenyon & Setters, for respondents.

FULLERTON, J.—The respondents are physicians and surgeons, residing at the city of Spokane, and sue to establish their claim against the estate of Thomas Lakin, deceased, for professional services rendered Lakin during his last illness. The action was tried by the lower court without the intervention of a jury. The trial court found in favor of the respondents, and entered a judgment establishing their claim as a just and valid claim against the estate. No exceptions were taken to the findings of fact made by the trial court, and the question is here on the question of the sufficiency of these facts to support the judgment.

¹Reported in 97 Pac. 447.

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The finding on which the liability is based was stated by the court in the following language:

"(3) That on or about the 24th day of May, 1905, the said Thomas C. Lakin was kicked in the head by a horse, sustaining fractures of various bones of the face and skull and severe injuries to the bones of the face and skull and the brain, from which he was rendered unconscious, in which condition he remained until and for several hours after being operated upon by the plaintiffs herein. That at the time of receiving said injury, Stanley Peterson who was then and there in the employ of the said Thomas C. Lakin and assisting him in the work that he was then performing, called Dr. John Gunning, a duly and regularly licensed and practising physician and surgeon, to attend the said Thomas C. Lakin and to render him such professional medical and surgical aid as he might require; that the said Dr. John Gunning examined the said Thomas C. Lakin and found that the only hope and chance of saving the life of said Thomas C. Lakin lay in, and for that purpose it was necessary to perform upon the said Thomas C. Lakin, a major surgical operation; that the said Dr. John Gunning did not have and could not procure in the town of Harrington or at any nearer town than the city of Spokane, the necessary equipment for the successful performance of said major operation, and that he would require the assistance of learned and skillful surgeons in the performing of said operation, of all of which the said Dr. John Gunning then and there informed one Geo. P. Lakin, then and there present, and who was then and there the nearest living relative of the said Thomas C. Lakin, now deceased and was assuming to represent him and had assumed charge of the management of his affairs; and the said Stanley Peterson was then and there in the employ of the said Thomas C. Lakin, as aforesaid; and thereupon the said Geo. P. Lakin told the said Dr. John Gunning to procure the services of learned and skillful surgeons and have the said operation performed and to have rendered to the said Thomas C. Lakin such professional services, care and treatment as in the judgment of the said Gunning, and others to be employed, might be deemed most expedient and best; and to use and caused to be used every effort to save the life and restore the health of the said Thomas C. Lakin. That there-

upon the said Dr. John Gunning telephoned to the plaintiffs herein asking them to take charge of and perform such operation as was necessary upon the said Thomas C. Lakin, and to render such professional services as might be necessary, during which conversation the said Geo. P. Lakin was present with the said Dr. John Gunning and heard the said Gunning and was informed of what was said during the said conversation. That thereupon the plaintiffs herein rendered certain professional services, care and treatment and performed certain major operations upon the said Thomas C. Lakin. That thereafter the said Thomas C. Lakin regained consciousness and was advised of the fact that the plaintiffs herein had rendered and were rendering certain professional services to him, the said Thomas C. Lakin, and the said Thomas C. Lakin made no objection whatever thereto or to the continuation of said services, and treatment; and thereafter plaintiffs continued to treat said Thomas C. Lakin, until the day of his death all of which was during the last sickness of the said Thomas C. Lakin."

The objection to the finding is that it fails to show any contract of employment on the part of Lakin for the rendition of the services by the physicians, and no subsequent ratification or agreement to pay on his part after the services had been rendered. The finding undoubtedly bears the construction the appellant places upon it, but we think the right of the physicians to recover for the reasonable value of their services, under circumstances such as are shown here, does not rest upon any contract with the injured person, either express or implied, but is recoverable by virtue of the statute. Services of the character here rendered are classed as expenses of the last sickness, and are given a preference right of payment over all ordinary debts out of the estate of the decedent. Bal. Code, §§ 6333, 6335, 6336 (P. C. §§ 2655, 2657, 2658). It is true that services of this character differ from administration and funeral charges, in that they are rendered during the life of the person on whose estate they are made a charge, but the necessity for their rendition is similar to that of the latter, and the law author-

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izing their payment can be justified on like principles. Schouler, Executors (3d ed.), § 423.

The question whether the complaint was or was not amended to correspond with the facts proven, is of no moment here. If there is a variance between the allegations and the proofs, this court is obligated by the statute to treat the complaint as amended, since the case comes to this court as one tried on its merits in which the appellant had full opportunity to present his defense. *Peterson v. Barry*, ante p. 361, 97 Pac. 239.

Nor is the question whether the charges made by the physicians, and allowed by the court, are reasonable, material here. This is a question to be determined from the evidence, and since the evidence has not been brought to this court, we cannot review it.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, ROOT, and MOUNT, JJ., concur.

DUNBAR and CROW, JJ., took no part.

[No. 7171. Decided September 22, 1908.]

NATIONAL SURETY COMPANY, *Appellant*, v. H. M. STEPHENS,
Respondent, GEORGE H. COLLIN *et al.*, *Defendants*.¹

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY. An appeal from a judgment dismissing an action to enjoin the issuance and payment of county warrants will be dismissed, where it is made to appear by affidavit before the hearing that the warrants had been issued and paid, there having been no temporary injunction in the case; since the controversy has ceased.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered August 6, 1907, upon findings in favor of the defendant, after a trial before the court without a jury, dismissing an action for an injunction. Appeal dismissed.

¹Reported in 97 Pac. 449.

E. C. Macdonald and Donald F. Kizer, for appellant.

R. M. Barnhart, J. Stanley Webster, and H. M. Stephens, for respondents.

HADLEY, C. J.—This action was brought to enjoin the issuance and payment of certain warrants by the officials of Spokane county. The defendants are respectively the members of the board of county commissioners and the auditor and treasurer of said county. The plaintiff is a surety company, and is the surety upon the several official bonds of the above-named officials. The complaint avers that the county commissioners passed a resolution whereby the sum of \$5,000 was appropriated from the moneys of Spokane county to aid in paying the expenses and fees in a certain case then pending before the Interstate Commerce Commission of the United States, wherein the city of Spokane, the chamber of commerce of Spokane, and the Spokane Jobbers Association were complainants, and several railway companies were defendants; that thereafter the board of county commissioners entered into a written contract with H. M. Stephens, an attorney residing in Spokane, whereby it was agreed in behalf of Spokane county to pay Stephens \$5,000 as fees for his professional services as attorney for the plaintiffs in the proceeding before the Interstate Commerce Commission, and that the board thereupon ordered the county auditor to issue to Stephens a warrant for the sum of \$5,000. The complaint shows that, by order of the board of county commissioners, application was made in behalf of Spokane county for leave to intervene in said Interstate Commerce proceeding, and that the county was in that manner admitted as a party thereto. It is, however, alleged that the county was not a proper or necessary party, for the reason that the proceeding was for the purpose of effecting a reduction of railway rates to the city of Spokane and other points in the county, but that the county as such had no interest therein. It is

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alleged that the defendant county auditor and county treasurer, respectively, threaten to issue and pay a warrant for the above-named sum, and that they will do so unless restrained. An injunction was asked against all the defendants.

Stephens filed a petition of intervention, alleging that the Interstate Commerce proceeding was one of great importance to all the people of Spokane county, that he had rendered extensive and valuable services therein, and that much more work was required in pursuance of the contract. He claimed that he was entitled to the issuance and payment of a warrant or warrants for the contract amount. The cause came on for trial, and such proceedings were had that a judgment was entered to the effect that the plaintiff shall take nothing by the action, and that the defendants and the intervenor shall recover their costs. The plaintiff has appealed.

The record does not disclose that any restraining order, temporary or otherwise, was ever issued in the action. The purpose of the action was to enjoin the issuance and payment of a warrant or warrants for an aggregate sum, and the respondents have moved to dismiss the appeal on the ground that the controversy has ceased. The affidavit in support of the motion shows that the proper officers of Spokane county have caused warrants to issue in conformity to the aforesaid contract in the aggregate sum of \$5,000; that in due course of business, the warrants were called for payment by the county treasurer, and that the same have been paid and the amount thereof has been received in cash by Stephens. These facts are not controverted by the appellant, and it therefore appears that the respondents, not being under the prohibition of any injunction, proceeded to the issuance and payment of the warrants, notwithstanding the pendency of the appeal. We think it clear that there is now no controversy, since the very thing the action sought to prevent has been accomplished.

Under the uniform rule of this court, the appeal must be dismissed, and it is so ordered.

RUDKIN, FULLERTON, ROOT, CROW, and MOUNT, JJ., concur.

[No. 7180. Decided September 22, 1908.]

ADOLPH BEHRENS *et al.*, *Appellants*, v. FRANCIS W. CLOUDY,
Respondent.¹

LANDLORD AND TENANT—LEASE—ASSIGNMENTS—COVENANTS—OPTION TO SELL. In a lease for the term of five years, containing as a part thereof an option to sell to the lessee within a specified time, a covenant not to let or underlet or assign the lease, or any part thereof, without the written consent of the lessor, applies to the option to sell; and an assignee of the option without the written consent of the lessor is not entitled to a specific performance of the option.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 23, 1907, upon findings in favor of the defendant, after a trial before the court without a jury, in an action for specific performance. Affirmed.

S. D. King, for appellants.

J. H. Allen, for respondent.

RUDKIN, J.—On the 24th day of March, 1906, the defendant Cloudy leased the premises now in controversy to M. Frances Kelly, for a term of five years from that date. The lease contained the following covenants, among others:

"The said party of the first part [lessor] agrees to sell to said party of the second part [lessee] the said described property at any time within eight months from and after the date hereof, for and in consideration of the sum of \$9,000; terms one-half cash and balance in five years."

Also:

"And the said party of the second part does hereby covenant, promise and agree . . . not to let or underlet the

¹Reported in 97 Pac. 450.

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whole or any part of said premises without the written consent of the said party of the first part, nor to assign this lease or any part thereof without such written consent."

On the 28th day of May, 1906, the lessee, M. Frances Kelly, her husband joining, attempted to assign the option to purchase to the plaintiffs in this action, without the written consent of the lessor and against his will and protest. This action was thereafter instituted to enforce specific performance of the agreement to sell. From a judgment in favor of the defendant, the present appeal is prosecuted.

The parties to the original lease might lawfully covenant that no assignment of the lease or any part thereof should be valid without the written consent of the lessor, and an assignment in violation of such covenant would confer no rights on the assignee. *Burck v. Taylor*, 52 U. S. 634, 13 L. Ed. 845; *Tabler, Crudup Co. v. Sheffield Land, Iron & Coal Co.*, 79 Ala. 377, 58 Am. Rep. 593; *Deffenbaugh v. Foster*, 40 Ind. 382; *Andrew v. Meyerdirck*, 87 Md. 511, 40 Atl. 173; *Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859. We think it equally clear that the covenant against assignments extended to and included the option to sell. The language of the covenant was that the lessee would not let or underlet or assign the lease, or any part thereof, without the written consent of the lessor. The option to sell was a part of the lease, and was evidently so intended by the parties. It will not be presumed that the lessor demised the premises to one person for a term of five years and agreed to sell to another at any time within eight months.

The appellants have no standing in court under their assignment, and without discussing other questions presented by the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, and CROW, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 7258. Decided September 24, 1908.]

IN RE SEATTLE.

THE CITY OF SEATTLE, *Respondent*, v. METEOR LAND
COMPANY *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS—ASSESSMENTS—BENEFITS—APPEAL—REVIEW. The decision of the commission, appointed to determine the proportion of benefits received by property from a local improvement, in determining the property to be assessed and apportioning the costs involves questions of fact and largely of opinion, and the same will not be disturbed on appeal merely because differences of opinion arise.

SAME—MODE OF ASSESSMENT. An assessment for local improvements required to be made in proportion to the benefits received, is not invalid because made in accordance with the value of the property, where the commission determines that the benefits received were in proportion to such value.

Appeal from a judgment of the superior court for King county, Griffin, J., entered October 11, 1907, confirming an assessment roll, after a hearing before the court on the merits. Affirmed.

William L. Waters, for appellant Meteor Land Co.

W. J. Daly, for appellant Monidah Trust.

Scott Calhoun and *King Dykeman*, for respondent.

PER CURIAM.—This is an appeal by certain property owners from a judgment confirming the assessment roll in a condemnation proceeding instituted by the city of Seattle, under Ordinance No. 14,345, for the widening of Third avenue, in that city.

The appellant Meteor Land Company assigns as error the failure of the eminent domain commission to assess a portion of the cost against the general fund of the city, the failure to assess a portion of the cost against property without the

¹Reported in 97 Pac. 444.

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assessment district created by the commission, and the assessment of certain property within the district less than its proportionate share of the cost. These several assignments present matters of fact and largely matters of opinion. In this class of cases, opinions will differ widely as to the proper boundaries for an assessment district, and as to the benefits to accrue to the different properties within the district; but this court cannot substitute its judgment for the judgment of those whom the law has charged with the duty of establishing the district and apportioning the cost, whenever such difference of opinion may arise. As said in *In re Seattle*, 46 Wash. 63, 89 Pac. 156:

"The questions suggested by the objections cited, it will be noticed, are principally questions of fact, and questions, moreover, which are incapable of solution with mathematical exactness, and into which the judgment and opinion of the individual or individuals who undertake their solution must largely enter. It is not difficult, therefore, to find persons who will take issue with the judgment of the persons who make the assessment, and who will testify to the incorrectness of the assessment as returned. The record in this case discloses a variety of opinions, but we do not think the evidence in favor of the objections overbalances the evidence in support of the return."

The appeal of the Monidah Trust is based upon assignments similar to those we have considered, and upon the further assignment that the assessment was levied under a mistake of law. The contention that the assessment was levied under a mistake of law is founded on the claim that the assessment is based upon the value of the property rather than upon the resulting benefits. We do not think that the record bears out this contention. True, the assessment is based largely upon values just as other assessments are based upon frontage. But this course was adopted because the commissioners were of opinion that the benefits to the property within the district were in proportion to the value of the property. This court is concerned with the result of the

commission's labors, rather than with their mode of procedure. In answer to a similar complaint in *In re Western Avenue*, 47 Wash. 42, 91 Pac. 548, we said:

"The appellants argue that this is assessing according to market value, and not according to benefits, the manner contemplated by the statute. We do not think, however, that this is a just criticism of the action of the commissioners. As we understand the evidence, the assessment was not based entirely upon values—that is, the commissioners did not merely make an estimate of the values of the different lots thought by them to be benefited by the improvement, and then apportion the charge among the lots on a percentage basis—but we understand that value was only one of the elements taken into consideration in estimating benefits; that they not only considered this, but considered all such other elements as appeared to them to enter into the question. There can be no valid objection to this method of proceeding, as certainly the value of a given tract is proper to be taken into consideration with other elements in determining what proportion of an assessment such tract shall bear. But if this were not so, the question would not be very material. The commissioners are chargeable with the result of their work, and not with the manner by which they arrive at that result. If the return itself does not show that the premises of the objector are assessed more than they are benefited, and more than their proportionate share of the cost of the improvement, the objector is not injured, and hence it is of no moment to him what process the commissioners employed in order to arrive at the result reached by them."

The findings of the commission and of the court below are supported by the evidence, and the judgment is accordingly affirmed.

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Opinion Per Curiam.

[No. 7810. Decided September 24, 1908.]

C. T. HARDINGER, *Appellant*, v. GEORGE C. COLUMBIA *et al.*,
Respondents.¹

BROKERS—AUTHORITY—POWER TO SELL. An employment of a broker to find a purchaser of real property does not authorize the broker to enter into a binding contract to sell.

VENDOR AND PURCHASER—UNAUTHORIZED CONTRACT—RATIFICATION—PRINCIPAL AND AGENT. A contract made to sell real estate, made subject to the owner's approval and entered into by a broker without authority, is not ratified by the owner by an acceptance of an offer for the property which specified the same price, but failed to specify material terms of the contract of which the owner had no knowledge.

Appeal from a judgment of the superior court for King county, Neterer, J., entered September 28, 1907, upon findings in favor of the defendants, after a trial before the court, dismissing on the merits an action for specific performance. Affirmed.

Granger & Magill and *Keenan & Hardinger*, for appellant.
Holcomb, Kirkpatrick & Doty, for respondents.

PER CURIAM.—This was an action to enforce specific performance of the following contract:

“\$100.00

Seattle, June 6, 1906.

“Received of C. T. Hardinger, of Seattle, one hundred dollars as earnest money on the purchase of block 5, Cumberland Addition to the city of Seattle, Washington, according to the official plat on file in the auditor's office in said county of King. Price of said land is \$3,800. Terms of sale are \$1,250 cash, to include earnest money. Balance of \$2,550 payable as follows: \$1,150 to be paid on delivery of deed and abstract, balance in two equal annual payments of \$1,275 each, with 6 per cent interest. Grantor to release mortgage as to any designated part of said block in tracts of 50 feet by 100 feet upon payment of \$150 therefor. Interest 6 per cent per annum upon deferred payments. If terms of

¹Reported in 97 Pac. 445.

sale are not complied with, the \$100 earnest money is forfeit, and buyer hereby releases all claims thereto. Sale subject to owner's approval. Earnest money refunded if abstract is not satisfactory to purchaser. (Signed) A. B. Newell, by F. H. Gilbert."

At the time this contract was entered into, the subagent, Gilbert, by whom the contract was signed and entered into, was an utter stranger to the owners of the property, and the most that can be claimed in favor of the plaintiff is that Newell, whose name is appended to the contract, was employed by the defendants to find a purchaser. Under repeated rulings of this court, such employment would not authorize the execution of a binding contract of sale. *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Scully v. Book*, 3 Wash. 182, 28 Pac. 556; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499. The contract, having been entered into without authority from the owners, is not obligatory upon them, in the absence of some subsequent ratification. Was there such ratification?

Under date of June 20, 1906, Newell informed the defendant G. C. Columbia, by letter, that he had an offer of \$3,800 for the property, \$1,250 cash, \$1,250 on or before one year, and the balance on or before two years, with interest on the deferred payments at the rate of six per cent per annum, and that he had a deposit on the proposition. In answer to this letter the recipient wired: "All right, offer accepted, will write today." The letter which followed simply confirmed the telegram. From the contract and correspondence it will be seen that the contract was made subject to the owners' approval. The owners never approved it, and had no knowledge of its existence or contents. The contract as entered into provides for a mortgage back, partial releases of the mortgage on payment of certain portions of the purchase price, and other provisions not referred to in the written correspondence. It is apparent from this that the minds of the parties never met and that the contract in suit was

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Citations of Counsel.

neither executed, approved, nor ratified by the defendants.

Such having been the conclusion of the court below, its judgment is affirmed, and we deem it unnecessary to discuss the other questions presented by the record.

[No. 7174. Decided September 24, 1908.]

THE STATE OF WASHINGTON, *Appellant*, v. H. S. WINSOR,
Respondent.¹

STATUTES—TITLE—REFERENCE TO SUBJECTS. The title to the anti-cigarette law, "to regulate and in certain cases prohibit" sales, does not violate the constitutional requirement that the subject shall be expressed in its title, even if the law is unconstitutional in part or contains prohibitive provisions only and the title takes a broader scope than its valid provisions actually cover; since the unconstitutionality of part of a statute does not render invalid other portions unless all are necessarily connected, and the title may properly refer to all its provisions.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 12, 1907, dismissing a prosecution, on sustaining a demurrer to the information. Reversed.

Richard M. Barnhart, Donald F. Kizer, and George A. Lee, for appellant, as to the sufficiency of the title of the act, cited, among other authorities: *Ex parte Yung Jon*, 28 Fed. 308; *Luck v. Sears*, 29 Ore. 421, 44 Pac. 693, 54 Am. St. 804, 32 L. R. A. 738; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Cantini v. Tillman*, 54 Fed. 969; *Hart v. Scott*, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86; *State v. Phenline*, 16 Ore. 107, 17 Pac. 572; *State v. Becker*, 3 S. D. 29, 51 N. W. 1018; *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559; *Judson v. Bessemer*, 87 Ala. 240, 6 South. 267, 4 L. R. A. 742; *State v. Scott*, 32 Wash. 279, 73 Pac. 365; *People ex rel. Gallatin*

¹Reported in 97 Pac. 446.

Nat. Bank v. Commissioners, 67 N. Y. 516; *State v. Burgoerfer*, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 846.

Cullen & Dudley, for respondent, contended, among other things, that the absolute prohibition provided in the body of the act was not fairly within a title to "regulate and in certain cases prohibit." *Miller v. Jones*, 80 Ala. 89; *Morgan v. State*, 81 Ala. 72, 1 South. 472; *Crabb v. State*, 88 Ga. 584, 15 S. E. 455; *Whitman v. State*, 80 Md. 410, 31 Atl. 325; *State v. Fay*, 44 N. J. L. 474; *Cantril v. Sainer*, 59 Iowa 26, 12 N. W. 753; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90; 17 Am. & Eng. Ency. Law (2d ed.), 227, 228; *People v. Gadway*, 61 Mich. 285, 1 Am. St. 578; *In re Hauck*, 70 Mich. 396, 28 N. W. 269; *Miller v. Jones*, 80 Ala. 89; *People v. Busse*, 231 Ill. 251. 83 N. E. 175; *Hart v. Scott*, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86.

FULLERTON, J.—The legislature of the state of Washington, at its session in 1907, passed an act regulating, and in certain cases prohibiting, the traffic in cigarettes. The respondent was informed against by the prosecuting attorney of Spokane county for having violated the provisions of the act, and was brought before the superior court of that county to answer to the offense. On arraignment he demurred to the information on the ground that the act on which the information was founded was unconstitutional. The trial judge sustained this contention, and entered a judgment dismissing the proceeding. The state appeals.

The act in question reads as follows:

"An act to regulate and in certain cases to prohibit the manufacture, sale, keeping, keeping for sale, owning, or giving away of cigarettes, cigarette paper, cigarette wrappers, and other substitutes for the same, and providing penalties for the violation thereof.

"Be it enacted by the Legislature of the State of Washington:

"Section 1. That it shall be unlawful for any person, by himself, clerk, servant, employe or agent, directly or indi-

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rectly, upon any pretense or by any device, to manufacture, sell, exchange, barter, dispose of or give away, or keep for sale, any cigarettes, cigarette paper or cigarette wrappers, or any paper made or prepared for the purpose of being filled with tobacco for smoking; and any person, for violation of the same, shall be guilty of a misdemeanor, and upon conviction shall, for the first offense, pay a fine of not less than ten dollars (\$10) nor more than fifty dollars (\$50) and cost of prosecution, and stand committed to the county jail until such costs are paid; and for the second and each subsequent offense, shall pay, upon conviction thereof, a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500), and the cost of prosecution, or be imprisoned in the county jail not to exceed six months: *Provided*, That the provisions hereof shall not apply to the sales of jobbers doing an interstate business with customers outside the state.

"Sec. 2. This act shall take effect September 1, 1907." Laws 1907, p. 293.

The constitutionality of the act is assailed on the ground that its subject is not expressed in its title. Counsel argue that while the act purports to contain both regulative and prohibitive provisions, it in fact contains prohibitive provisions only, since the right of sale which it purports to exempt from the prohibitive provisions exists independent of state legislation, being matter of interstate commerce which the state has no power either to prohibit or regulate; and that the act being in effect prohibitive only, its title, inasmuch as it indicates both regulative and prohibitive provisions, does not give fair notice of the contents of the body of the act, and is thus so far misleading and deceptive as to render the act void.

But we cannot think the result contended for follows, even if we concede that the legislature is without power to prohibit jobbers in this state doing an interstate business from selling to customers outside of the state. This court has held, and the holding is in common with the almost uniform current of authority, that the intermixing in one act of con-

stitutional and unconstitutional provisions does not necessarily render the whole act void; the true rule being that the valid part will remain operative unless all of the provisions of the act are connected in subject-matter which depend upon each other and operate together for the same purpose, or are otherwise so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other. *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 621, 102 Am. St. 885, 65 L. R. A. 336.

But these propositions must be unsound if the respondent's contention be correct. Necessarily the title to such an act directs attention to its invalid as well as its valid portions, and the title to every such act, when tested by the rule the respondent here seeks to invoke, must be misleading and deceptive in the sense that the title indicates that the act takes a broader scope than it actually takes. But the title of an act need not be an index to the contents of the act. Its purpose is to call attention to the subject of the act so that any one reading the title may know what matter is being legislated upon. It is not its purpose to give details. For these the act itself must be consulted. It would seem then that, if the title gives fair notice of those parts of the act that are within the power of the legislature, it cannot be said to be misleading or deceptive because it indicates that it may contain matters not within its powers. So in this case, since the title of the act does give notice that legislation prohibitive of the cigarette traffic may be found in the body of the act, the act as a whole ought not to be held invalid because its title also gives notice that it contains regulations that are invalid because violative of a higher law. As was said by the Supreme Court of the United States in *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431:

"As the state constitution has not indicated the degree of particularity necessary to express in its title the one object of an act, the courts should not embarrass legislation by technical interpretations based upon mere form or phrase-

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Statement of Case.

ology. The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it was not sufficiently expressed by the title."

Counsel have filed exhaustive briefs which discuss the question in all of its phases, but we think it unnecessary for us to pursue the inquiry further. We hold the act constitutional, and direct that the judgment appealed from be reversed, and the cause remanded with instructions to reinstate the case and require the defendant to plead to the merits.

RUDKIN, ROOT, and CROW, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7279. Decided September 24, 1908.]

LOA HELMER *et al.*, *Respondents*, v. TITLE GUARANTY &
SURETY COMPANY, OF SCRANTON, PENNSYLVANIA,
Appellant.¹

JUDGMENT — ON THE PLEADINGS — PLEADINGS — INCONSISTENCY OF DENIALS AND AFFIRMATIVE DEFENSES. In an action on a bond to indemnify plaintiffs against loss on a building contract, in which the complaint alleged breach of the bond, the recovery of judgments for debt foreclosing liens on the property and plaintiffs' payment of the same, a judgment for plaintiffs on the pleadings is not warranted by an affirmative defense admitting the execution and conditions of the building contract and bond, where the answer generally denied each and all of the allegations of the complaint; since, if the answer were inconsistent in the particulars specified, the denial raised other material issues respecting the furnishing of the material and foreclosure of the liens, which would prevent judgment on the pleadings.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 21, 1907, upon the pleadings, in favor of the plaintiff. Reversed.

¹Reported in 97 Pac. 451.

P. P. Carroll, John E. Carroll, and Walter B. Beals, for appellant, contended, among other things, that objection to affirmative defenses must be taken by demurrer and not by motion for judgment after filing a reply. *State ex rel. Holgate v. Superior Court*, 21 Wash. 33, 56 Pac. 932. Judgment on the pleadings is rendered on motion of plaintiff only when the answer admits or leaves undenied all the material facts stated in the complaint. *Finley v. Tucson*, 7 Ariz. 108, 60 Pac. 872; *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753; *Amador County v. Butterfield*, 51 Cal. 526; *Felch v. Beaudry*, 40 Cal. 439; *Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291; *Lee v. Jacob*, 38 N. Y. App. Div. 531, 56 N. Y. Supp. 645; *Shattuc v. McArthur*, 25 Fed. 133. Such a judgment cannot be given where the pleadings of defendant sets up a substantial and issuable defense. 23 Cyc. 769; *Prost v. More*, 40 Cal. 347; *Alsbaugh v. Reid*, 6 Idaho 223, 55 Pac. 300; *Parker v. Des Moines Life Ass'n*, 108 Iowa 117, 78 N. W. 826; *Lewis v. Foard*, 112 N. C. 402, 17 S. E. 9. The test proposed by the decisions is that the declaration or complaint must be sufficient to withstand a general demurrer. 23 Cyc. 740; *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291; *Sloan v. Faurot*, 11 Ind. App. 689, 39 N. E. 539; *Ishmel v. Potts* (Tex. Civ. App.), 44 S. W. 615; *Loeber v. Delahaye & Co.*, 7 Iowa 478.

John H. Perry, for respondents.

Crow, J.—This is an action prosecuted by Loa Helmer and W. F. Helmer, her husband, against the Title Guaranty & Surety Company, a corporation, to recover damages on an indemnity bond. After issue joined, judgment was, upon motion, entered upon the pleadings in favor of the plaintiffs, and the defendant has appealed.

The appellant has presented numerous assignments of error, all of which, with the exception of the one that the court erred in entering judgment on the pleadings, are devoid of merit. The respondents in their complaint, in sub-

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stance, allege that, on October 3, 1905, Loa Helmer entered into a written contract with one A. P. Gillies, a contractor, for the erection of a certain dwelling house in the city of Seattle; that on October 9, 1905, Gillies as principal and the appellant Title Guaranty & Surety Company as surety executed and delivered to her a written bond, to indemnify and save her harmless from any loss resulting from a breach of the building contract; that Gillies incurred, and failed to pay, a large amount of indebtedness to divers and sundry persons, for material and labor used in the erection of the building; that the various claimants filed lien notices, which were assigned to one Kalida Ryan; that on or about June 1, 1906, the assignee, Kalida Ryan, commenced an action to foreclose the material and labor liens; that on June 20, 1906, the respondents in writing notified appellant of the commencement of the action, and demanded that it pay the amount claimed, or defend and save the respondents harmless; that appellant did appear and defend the foreclosure action for and on behalf of respondents; that on a trial thereof, judgment for \$655.20 debt, and \$100 attorney's fees, and a decree of foreclosure, were entered against the respondents; that respondents had satisfied the judgment; and that upon demand the appellant had neglected and refused to reimburse them. The answer denied each and all of these allegations, but pleaded certain affirmative defenses, in which the execution and conditions of the building contract and the indemnity bond pleaded by respondents were substantially alleged.

The allegations of the complaint having been specifically denied, the only theory on which the respondents could recover judgment on the pleadings would be that the affirmative defenses of the answer were so inconsistent with its denials as to relieve the respondents from the necessity of making proof of the allegations of their complaint. In *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177, it was held that, where an allegation of general denial in an answer is followed in an affirmative defense by a special aver-

ment of the truth of the matter which had been denied, the defenses are so inconsistent that they cannot stand together, and that the plaintiff will not be compelled to establish the truth of the allegation of his complaint to which such defenses were set up.

We cannot so construe the pleadings before us as to enable us to apply this rule and hold that the respondents were relieved from the necessity of producing evidence to sustain any of the allegations of their complaint. The answer fails to disclose any affirmative defense which would amount to an admission of allegations of the complaint, other than those above mentioned relative to the execution of the contract and bond. In their reply the respondents, as an estoppel, pleaded certain portions of the records of the foreclosure action, but upon respondents' motion for judgment upon the pleadings, such affirmative allegation of their reply must be considered as denied. Conceding that the affirmative allegations of the answer relieved the respondents from the necessity of introducing any evidence to prove the execution and conditions of the building contract and the indemnity bond, it was, nevertheless, under the denials of the answer, necessary for them to show by competent evidence that the material and labor liens had been incurred, that they had been foreclosed, that respondents had given notice to the appellant to make payment or defend the foreclosure action and save them harmless, and that the appellant had done so. In the absence of evidence offered to sustain these allegations, the respondents were not entitled to judgment upon the pleadings.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., FULLERTON, and MOUNT, JJ., concur.

ROOT and RUDKIN, JJ., took no part.

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Opinion Per RUDKIN, J.

[No. 7241. Decided September 24, 1908.]

H. D. GRIMM *et al.*, *Respondents*, v. PACIFIC CREOSOTING
COMPANY, *Appellant*, JOHN H. SAUNDERS, *Defendant*,
OLYMPIA HARDWARE COMPANY *et al.*, *Interveners*.¹

LOGS AND LOGGING—LIENS—FORECLOSURE—ELOIGNMENT—ACTIONS—JOINDER—PARTIES. In an action to foreclose liens upon several booms of logs, two of which had been eloigned and removed from the jurisdiction of the court by a defendant, he is a proper party to the foreclosure action, where it is alleged that he had also purchased the booms within the jurisdiction of the court, and damages may be awarded against him for the eloignment, and his demurrer for misjoinder of causes of action is properly overruled.

APPEAL—RESERVATION OF GROUNDS—OBJECTIONS. Where no demand for a jury trial was made below, the question will not be considered on appeal.

SAME—LIEN ON PORTION OF LOGS FOR ENTIRE SERVICE. Lien claimants who had worked for defendant for from one to six months, in getting out logs in several log booms, have a lien upon all the logs cut and secured during the time, and they need not prove that the services for which the lien was filed were all performed in cutting and securing the particular logs against which the lien was filed.

SAME—COSTS—ATTORNEY'S FEES—LIABILITY OF ELOIGNER. In an action foreclosing liens on certain logs, and for damages against a defendant for the eloignment of logs, it is error in entering personal judgment against the eloigner to tax as costs attorney's and receiver's fees allowed in the matter of the foreclosure.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered September 28, 1907, upon findings in favor of the plaintiffs, after a trial before the court, in an action to foreclose liens on logs. Modified as to costs.

Troy & Falknor, for appellant.

E. N. Steele and *King & King*, for respondents.

RUDKIN, J.—This action was instituted to foreclose a lien for services and labor performed at the special instance and request of the defendant Saunders, in cutting and securing

¹Reported in 97 Pac. 297.

certain logs and piles. From a judgment in favor of the several plaintiffs, the defendant Pacific Creosoting Company has appealed.

The property against which it was sought to foreclose the lien was described in the complaint as one boom of piles or logs, containing 31,500 running feet of piles or logs, and one boom of piles or logs containing 39,470 running feet of piles or logs, all of which were branded or marked "S" on the end thereof, and about 8,000 running feet of piles or logs lying partly on land and partly in the water in section 18, township 18, north of range 1 east, W. M., in Thurston county. The complaint further alleged that all the piles or logs above described had been purchased by the appellant, the Pacific Creosoting Company, and that the two booms had been eloigned by the purchaser and removed beyond the jurisdiction of the court to some place to the respondents unknown. The complaint prayed for a foreclosure of the lien, and for damages against the Creosoting Company for the eloignment.

A demurrer to the complaint for misjoinder of causes of action was overruled, and this ruling is the first error assigned. If the contention of the appellant, that it had no interest in or claim to the logs within the jurisdiction of the court against which the foreclosure was sought, were borne out by the record, there would be much force in its further contention that two causes of action were improperly united. Such, however, is not the case here. The complaint alleged that the appellant purchased not only the two booms which had been removed beyond the jurisdiction of the court, but also the 8,000 lineal feet of piling within the jurisdiction of the court against which the lien was actually foreclosed. The appellant was, therefore, a proper party to the foreclosure action; and being such, it was competent for the court to give judgment in damages against it for the eloignment, under Bal. Code, § 5949 (P. C. § 6101). Whether the appellant

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was entitled to a jury trial in the case for eloinment we need not inquire, as no demand for a jury was made.

The remaining assignments, except in relation to the question of costs, are based on the insufficiency of the testimony to sustain the judgment. The proof tends to show that the several respondents were in the employ of the defendant Saunders, from one to six months prior to the date of filing the lien, and that, during a portion of that time, some of the respondents, at least, were engaged in cutting and securing logs which were boomed by the defendant Saunders and consigned to Moran Bros. at Seattle, and in cutting and securing two other booms of piles or logs which were sold and delivered to the appellant more than thirty days prior to the date of filing the lien claim. The court below found that all the labor and services for which a foreclosure was sought were performed in cutting and securing the two booms eloinged within the thirty days before filing the lien and upon the 8,000 feet within Thurston county. If it was incumbent upon the respondents to prove that such was the case, the proof on their part is far from satisfactory, though we are not prepared to say that the findings are unsupported by the testimony. But, in our opinion, the several respondents had a lien on all the logs and on all the piles cut and secured during the time of their employment, and it was not incumbent upon them to prove that the services for which the lien was filed were all performed in cutting and securing the particular piles or logs against which the lien was claimed. The contention that the decree is unsupported by the testimony is, therefore, without merit.

The last assignment relates to a question of costs. The 8,000 lineal feet of logs or piles against which the lien was actually foreclosed were of the value of \$345, according to the testimony and the return of the sheriff on the special execution issued on the judgment. In the foreclosure action a receiver was appointed to take charge of the property, and

in the decree of foreclosure a personal judgment was given against the appellant, not only for the aggregate amount of the several lien claims, but also for the costs of the foreclosure, including \$340 attorney's fees allowed by the court, and \$231 receiver's fees. This, in our opinion, was error. While it was competent for the court to give judgment against the eloigner in the foreclosure action, yet the recovery should not exceed the amount recoverable in an action at law. In an action at law no attorney's fees or receiver's fees could be taxed, and they should not have been taxed personally against the appellant in this action.

The judgment against the appellant will, therefore, be modified by striking therefrom and from the cost bill the items of \$340 attorney's fees and \$231 receiver's fees, and as thus modified the judgment is affirmed. The appellant will recover its costs on appeal.

HADLEY, C. J., FULLERTON, ROOT, MOUNT, and CROW, JJ., concur.

[No. 7178. Decided September 24, 1908.]

THE OLD NATIONAL BANK, *Respondent*, v. EXCHANGE
NATIONAL BANK, OF COEUR D'ALENE, IDAHO, *Appellant*,
W. H. SMITH *et al.*, *Respondents*.¹

BANKS AND BANKING—CERTIFICATE OF DEPOSIT—DEFENSES—ESTOPPEL TO ASSERT. Where a bank, upon inquiry, assures an indorser of a certificate of deposit, issued by the bank to one of its customers, that the same will be paid upon presentation, whereby the indorser and holder were lulled into a feeling of security and prevented from taking steps to protect themselves, the bank is estopped to assert any defense against the holder of the certificate, where it may be reasonably inferred that the occurrence was communicated to the holder and both the holder and indorser were interested therein at the time.

¹Reported in 97 Pac. 462.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 27, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on a certificate of deposit. Affirmed.

Belden & Losey and Ezra R. Whitla, for appellant, to the point that there was no estoppel, cited: *Near v. Green*, 113 Iowa 647, 85 N. W. 799; *Gee v. Moss*, 68 Iowa 318, 27 N. W. 268; *Bashore v. Parker*, 146 Cal. 525, 80 Pac. 707; 2 Pomeroy, Equity Jurisprudence, § 812; *Shoufe v. Griffiths*, 4 Wash. 161, 30 Pac. 93, 31 Am. St. 910; *Girault v. Hotelling Co.*, 7 Wash. 90, 34 Pac. 471; 16 Cyc. 794, and cases cited; *Coffelt v. First Nat. Bank*, 52 Kan. 600, 35 Pac. 289; *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 35 Pac. 876. The estoppel must be specially pleaded. 16 Cyc. 811; Bliss, Code Pleadings, § 364; Boone, Code Pleadings, § 67; *Walker v. Baxter*, 6 Wash. 244, 33 Pac. 426; *Warder v. Baldwin*, 51 Wis. 450, 8 N. W. 257; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Phillips v. Van Schaick & Wilcox*, 37 Iowa 229; *Carnahan v. Brewster* (Neb.), 96 N. W. 590; *Pratt v. Hawes*, 118 Wis. 603, 95 N. W. 965.

Wakefield & Witherspoon and H. M. Stephens, for respondent, Old National Bank, contended, among other things, that the appellant is estopped. 4 Cyc. 81; *Bingham v. Walla Walla*, 3 Wash. Ter. 68, 13 Pac. 408; *Moore v. Brownfield*, 10 Wash. 439, 39 Pac. 113; *Globe Nav. Co. v. Maryland Casualty Co.*, 39 Wash. 299, 81 Pac. 826; *Lee v. Kirkpatrick*, 14 N. J. Eq. 264; *Gaines v. Deposit Bank of Frankfort*, 19 Ky. Law 171, 39 S. W. 438; *Rash v. Hart*, 28 Ky. Law 264, 89 S. W. 192; *Vellum v. Demerle*, 20 N. Y. Supp. 516; *Central R. Co. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 575; *Griffiths v. Sears*, 112 Pa. St. 523, 4 Atl. 492; *Krathwohl v. Dawson*, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496.

Root, J.—The appellant herein is a national bank doing business in Coeur d'Alene, Idaho. The respondent The Old National Bank is a national bank doing business in the city of Spokane, Washington. The respondent bank brought this action against the appellant, joining as codefendants the other respondents herein, to recover upon an instrument issued by appellant in the following words and figures:

“Exchange National Bank. No. 1996.

“Coeur d'Alene, Idaho, June 16th, 1904.

“W. H. Smith has deposited in this bank \$2,000.00, two thousand and no 100 dollars, payable to self, in current funds on the return of this certificate properly endorsed. Interest at 4 per cent if left three months. Wm. Dollar, Pres.

“Not subject to check. 10055 Sept. 19-04.”

This instrument was delivered on the date of its issuance to the respondent William H. Smith, who thereafter indorsed and delivered the same to O. M. Sparks, who thereafter indorsed and delivered the same to the respondent bank, with directions to credit the same to the account of the First National Bank of Coeur d'Alene, which was done. When the respondent bank received the certificate from Sparks, it discovered that there would be due upon said certificate some \$20 interest in about twenty days, and it therefore held the same in order to collect and make a profit of said interest.

Some days after the respondent bank had received this certificate, said Sparks, being aware of some difficulty between Smith and his wife and anticipating a divorce proceeding which might result in complicating Smith's business affairs, telephoned to the appellant bank and asked if the certificate had been presented for payment, and was informed that it had not been. Later, the same day, after having made some inquiries of the First National Bank and of this respondent bank, said Sparks again telephoned to the appellant bank and asked if said certificate would be paid upon presentment. As to what the answer was, there is an irreconcilable conflict. The appellant bank claimed that they stated

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that said certificate would not be paid, while the evidence of respondents is to the effect that the appellant bank said that it would be paid. The trial court found with the respondents upon this issue, and we think the evidence justifies the finding.

The appellant bank had another customer with the same name as the one to whom this certificate was issued, the name of each being William H. Smith. In the trial of the case, the recipient of the certificate was indicated as "Smith No. 2," and the other customer as "Smith No. 1," and we will so designate them herein. Smith No. 1 had an account with appellant bank, and had on deposit something over \$2,000 in said bank. Smith No. 2 had a small amount subject to check aside from the amount represented by this certificate. He drew numerous checks against the bank, which paid the same owing to its officers getting the accounts of the two Smiths confused. The mistake was discovered about the 16th of September, when the bank learned that Smith No. 2 had overdrawn his account to the extent of \$1,337.36. A few days thereafter, respondent bank presented this certificate to appellant, and the latter refused to pay the same or any portion thereof, excepting the difference between the amount which Smith had overdrawn, \$1,337.76, and the amount of the certificate, \$2,000 and interest. The appellant pleaded the following statutes of Idaho:

"A nonnegotiable written contract for the payment of money or personal property may be transferred by indorsement in like manner with negotiable instruments. Such indorsement transfers all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses, existing in favor of the maker at the time of the indorsement." Rev. Stats. Idaho, § 3600, Chap. V, Title XIII.

"In the case of an assignment of a thing in action the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before notice of the assignment." Id., § 4091, Chap. I, Title III.

"A banker has a general lien dependent on possession upon all property in his hands belonging to a customer for

the balance due to him from such customer in the course of the business." *Id.*, § 9448, Chap. VI, Title XII.

It contends that under these statutes it was authorized to offset against the amount due on the certificate the amount overdrawn by Smith No. 2. Respondent bank claims that these statutes do not apply to cases of this kind. It also claims that the appellant is estopped to make any offset or interpose any defense against the amount due upon the certificate as shown by its terms, for the reason that said bank assured Sparks that the same would be paid when presented. Appellant bank claims that these facts do not constitute an estoppel, for the reason that Sparks had already parted with the certificate at the time he made the inquiry of appellant bank, and that the respondent bank had taken the certificate prior to this representation, and that consequently said representation had not constituted any inducement to their purchasing the certificate.

The purpose of Sparks in making inquiry of the appellant bank as to whether it would pay this certificate was to protect himself as an indorser of the certificate. He was interested in its payment, inasmuch as he had indorsed it when the same was turned over to respondent bank. The assurances given him by the appellant bank undoubtedly constituted an estoppel which he could have asserted to prevent the appellant bank from interposing any defense against the certificate. It seems to us that, under the facts of this case, the respondent bank also had a right to assert this estoppel. It would seem that any virtue which the certificate had in any litigation between Sparks and appellant, it would likewise have in a suit between appellant and respondent banks. If respondent bank could not recover on this certificate against appellant, it would ordinarily have recourse against Sparks, who had indorsed and delivered the certificate to respondent bank. Had the respondent bank, upon the appellant's refusing to pay the certificate, turned the same back to Sparks,

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he could undoubtedly have maintained an action against the appellant bank, the latter being estopped to urge any defense to his action. Thus there could be accomplished indirectly what the appellant insists cannot be accomplished directly. There would seem to be no good reason for preventing the doing of a thing directly which may be accomplished by indirectness. At the time appellant bank assured Sparks that the certificate would be paid upon presentment, both Sparks and respondent bank were interested in the certificate, the former as an indorser and the latter as holder, and we think it may be properly presumed that the respondent bank was notified of the representations. Had the appellant bank at that time notified Sparks that the certificate would not be paid, or that it had or intended to assert any defense thereto, Sparks could have taken steps promptly to recoup against Smith, and it is possible that neither he nor respondent bank would have suffered any loss. But being assured that the certificate was all right and would be paid, he and the others interested therein were not called upon to take any action in the premises. He was lulled into a feeling of security which undoubtedly prevented himself and the other indorsers, and the respondent bank as holder, from taking any steps to protect themselves as against Smith.

We think the judgment of the superior court was correct, and it is therefore affirmed.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

[No. 7458. Decided September 24, 1908.]

THE CITY OF SEATTLE, *Respondent*, v. FRED HURST,
Appellant.¹

MUNICIPAL CORPORATIONS—ORDINANCES—SOLICITATION IN DEPOTS—CONTRACT VIOLATING ORDINANCE. An ordinance making it a misdemeanor for hack drivers to solicit customers for hire in railroad stations when used by passengers leaving or entering the same, prevents the owner of a depot from permitting such solicitation by contract granting the exclusive privilege of such solicitation.

CONSTITUTIONAL LAW—RIGHT OF CONTRACT. An ordinance prohibiting solicitation by hack drivers in railroad stations when used by passengers entering or leaving the same is not an unreasonable restriction upon the right of private contract, especially where the passengers have opportunity on the trains and at an office in the building to fulfill their wants without solicitation.

SAME—POLICE POWER. Such an ordinance is not invalid as to a pre-existing contract allowing solicitation; since all contracts are subject to the police power, and any limitation of the contract would be *damnum absque injuria*.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 22, 1908, upon a trial and conviction of the misdemeanor of soliciting passengers for hire in a railway station, after a trial before the court upon an agreed statement of facts. Affirmed.

J. B. Metcalfe, for appellant.

Ellis de Bruler, for respondent.

MOUNT, J.—The appellant was convicted under an ordinance of the city of Seattle making it a misdemeanor for hack solicitors to solicit passengers for hire in a railroad station when such station is being used by passengers leaving or entering. He appeals from a judgment assessing a fine against him.

The facts are agreed to, as follows:

“That the defendant, on the 3d day of July, 1907, was acting and engaged as a hack solicitor, and while engaged

¹Reported in 97 Pac. 454.

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in such occupation soliciting customers and passengers for hire, did go upon the railroad station and in the railroad depot, in the said city of Seattle, at the intersection of King street and Third avenue south, known as the King street station or Union depot, while the same was being used by passengers leaving said railroad station; that this was against the provisions of sections 1 and 8 of ordinance 14742 of the city of Seattle, as alleged in said complaint, said ordinance being approved November 20, 1906, and entitled, 'An ordinance relating to the conduct of persons and to the places occupied by them and vehicles used by them while engaged as hack or omnibus driver, hotel runner, steamboat runner, expressman or solicitor of customers or passengers for hire and providing a penalty for any violation thereof,' section 1 of which reads as follows: 'No hack or omnibus driver, hotel runner, steamboat runner, expressman or solicitor while engaged in such occupation and soliciting customers or passengers for hire, shall be allowed upon any wharf or railroad station or roadway leading therein in the city of Seattle when such wharf, railroad station or railway leading therein is being used by passengers leaving or entering such wharf or railroad station.' Section 8 reads as follows: 'Any person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$50 or be imprisoned not more than thirty days or both fined and imprisoned.' That the defendant, Fred Hurst, is an employee of the Seattle Transfer Company, a corporation duly organized and existing under the laws of the state of Washington and is a common carrier of passengers and baggage for hire; and that the said Fred Hurst, as an employee of the said Seattle Transfer Company, was engaged in the solicitation, as such employee, of customers for hire, within the limits of the building at the corner of Third avenue and King street in the city of Seattle, county and state aforesaid. And while so conducting and carrying on his said employment and not in any wise interfering with or molesting the said passengers and traffic from said building, further than soliciting passengers for hire, as hereinabove set forth, as fully appears by the contract of the said Seattle Transfer Company and the Great Northern Railway Company, the provisions of which said contract are hereby referred to and made a part of this

agreed statement of facts, and was so engaged with the consent and permission of the said railroad companies, as set forth in said contract. It is also stipulated that this agreed statement of facts shall be filed as Exhibit 'A' in this case and stand and remain as a full and complete statement of facts on appeal in event either party desires to take appeal from the decisions of the court herein."

The agreement is as follows:

"Agreement, entered into this 3rd day of June, 1905, between one Great Northern Railway Company, the party of the first part, and the Seattle Transfer Company, party of the second part,

"Witneseth: Whereas, the party of the first part deems it advisable, for the convenience of passengers coming into the city of Seattle, Washington, upon its trains, that facilities be furnished to such passengers upon said trains and in its depot at said city of Seattle, to arrange for the transfer of their baggage and for their own passage by omnibus, carriages, or otherwise, to various parts of the city of Seattle and other railway depots and steamboat wharves therein; and

"Whereas, it would greatly interfere with the business of the party of the first part and the comfort and convenience of said passengers to permit hackmen and transfer men generally to enter upon its said trains and into its said depot for the purpose of soliciting the patronage of said passengers:

"Now, therefore, the parties hereto covenant and agree as follows: The party of the first part, in consideration of the payments and covenants herein stipulated to be made, kept and performed by the party of the second part, does hereby grant to the party of the second part, for and during the term of three years from and after the date thereof, the exclusive right and privilege to enter upon the trains of the party of the first part approaching said Seattle and into the said depot and train-shed of the party of the first part at said Seattle, and to solicit and contract with passengers for said Seattle thereon and therein for the transfer and delivery of their baggage and for their passage in omnibus or otherwise to various parts of said city of Seattle and to the depots of other railway lines and to the wharves of boat lines therein, and for the hiring of hacks, cabs and carriages to such passengers for such transfer and passage; and also to keep and

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use, during the term hereof, a stand in the depot of the party of the first part at said Seattle, to be set apart to the said party of the second part for the purpose of transacting such business.

"The party of the second part shall and will, during the term aforesaid, in connection with said business, upon the arrival of passenger trains of the party of the first part at its depot, keep and maintain, an agent at said stand in said depot to attend to and accommodate passengers entering said Seattle upon the trains of the party of the first part, and the party of the second part shall and will, during said term, cause one of its agents to meet all important passenger trains of the party of the first part approaching said Seattle, before they reach the said depot, and to furnish to the passengers on such trains an opportunity to arrange for passage in said omnibuses, and for the hiring of carriages and the transfer and delivery of baggage as aforesaid before arriving at said depot. The party of the first part shall and will permit such agents so meeting such trains to ride thereon without compensation for the purpose of transacting such business. The party of the first part shall and will in each year during the continuance of this contract issue not to exceed four annual passes, good over the lines of the party of the first part within the state of Washington. Such passes to be issued in favor of such officers or employees of the party of the second part as its president or general manager shall direct. The party of the second part shall and will cause said agents so to be kept and maintained at said stand in said depot upon the arrival of trains of the party of the first part and said agents so to be caused to meet important trains approaching said city of Seattle to wear a cap similar to those worn by railway employees, lettered in such manner as to plainly indicate to passengers and employees of the party of the first part the nature of the business of such agent. All agents and employees of the party of the second part engaged in the performance of the business aforesaid shall transact such business in and about said depot and upon said trains in a quiet and polite manner, and they shall in this regard be subject to the directions of the conductors upon such trains and of the depot master in charge of said depot; and the party of the second part shall and will dismiss from his service in or upon said trains and in or about said depot any

agent, driver or other employee upon receiving written notice from the party of the first part that any such employee or agent is objectionable to the party of the first part. The party of the second part shall, during the term aforesaid, have and cause to be present at said depot upon the arrival of all important passenger trains of the party of the first part one or more omnibuses to take passengers arriving thereon to various hotels in said city of Seattle and to the depot of other railways therein, and shall also have and cause to be within call at said depot on the arrival of all trains a sufficient number of hacks, carriages or cabs to accommodate the passengers coming into said depot upon said trains on all ordinary occasions. Such hacks, carriages, cabs and omnibuses shall be kept in a clean, neat and serviceable condition and provided with strong, gentle and serviceable horses, and the drivers in charge thereof shall be of temperate habits, polite, honest and reliable and capable of performing their duties in an efficient manner. None of such drivers or other employees in charge of such omnibuses, hacks, carriages or cabs shall be permitted to enter into or upon said trains, depot or train-shed of the party of the first part for the purpose of soliciting the patronage of passengers, but all such soliciting and contracting with passengers within said depot and upon said trains shall be conducted by said agents hereinbefore mentioned. The scale of charges for the service to be rendered to passengers hereunder shall in all cases be reasonable and not greater than those provided for by the ordinance of the said city of Seattle, and proof of any exorbitant or unfair charge or dealing by any driver, employee or agent of the party of the second part to or with any of said passengers shall be deemed sufficient grounds for the dismissal of such transfer employee from the service of the party of the second part upon demand of the party of the first part.

“The party of the second part shall and will indemnify and save harmless the party of the first part of and from any and all damage costs, expenses or liabilities on account of any personal injury to any of such employees of the party of the second part while in or upon the said trains of the party of the first part or in its said depot and train-shed, in the transaction of the business of the party of the second part hereunder, whenever injury shall be in any manner caused by de-

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railment of said trains or improper operation thereof, by defects in said depot or train-shed, or the platforms or approaches thereto or otherwise by the negligence of the party of the first part.

"The party of the second part shall, in the performance of the service hereinbefore provided, be deemed to be a common carrier of passengers and baggage, and the party of the second part hereby assumes all risk of and liability for personal injuries to passengers, and for loss or damage to baggage in any manner caused by the negligence of the party of the second part, its employees or agent, otherwise, in and about the transaction of the business aforesaid; and the party of the second part shall and will indemnify and save harmless the party of the first part of and from any and all damages, costs, charges or liabilities to any such persons on account of such personal injuries to any such passengers, or loss of or injury to the baggage of any such passengers while being transferred or transported by the party of the second part, as hereinbefore provided. The party of the second part shall and will pay to the party of the first part, for the privilege hereby granted, the sum of four hundred dollars per year payable in advance, in monthly installments of thirty-three and 22-100 dollars on the 15th day of each and every month during said term. In case the party of the second part shall make default in any of the payments, covenants or conditions hereinbefore stipulated to be kept and performed by the party of the second part and such default shall continue for the period of twenty days after written notice thereof from the party of the first part, then the party of the first part may, at its option, terminate, cancel and annul this agreement and the rights and privileges thereby granted, upon ten days' notice in writing to the party of the second part of its intention so to do.

"In witness whereof, the parties hereto have caused this agreement to be duly executed the day and year first hereinbefore written."

It is argued by the appellant, at length, that the King street station or Union depot is the property of the Great Northern Railway Company, and as such is to be deemed in every legal sense private property of the railway company as between itself and those of the general public who have no

occasion to use the depot for purposes of transportation, and that it is lawful for the railway or depot company to make a contract granting special privileges to certain persons for supplying passengers with hacks or conveyance or baggage transfer. Many cases are cited to support that position. Among the cases are *Oregon Short Line R. Co. v. Davidson* (Utah), 94 Pac. 10; *Union Depot & R. Co. v. Meeking* (Colo.) 94 Pac. 16; *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225; *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26 Sup. Ct. 91, 51 L. Ed. 192.

There are many other cases which sustain the position above stated; but that position is not the controlling question in this case. It may be conceded that the depot is the private property of the railway company, and that the railway company may grant special privileges therein. But this case, in our opinion, depends upon the validity of the ordinance. If the ordinance is valid, making it a misdemeanor for hack solicitors to solicit customers for hire in railroad stations when such stations are being used by passengers leaving and entering the same, then it cannot be contended reasonably that a private owner may by a contract nullify the ordinance by permitting one or more persons to violate the ordinance. *Chillicothe v. Brown*, 38 Mo. App. 609.

It is argued by appellant that the ordinance is invalid because it is unreasonable. It is not claimed that the city is not authorized to pass ordinances regulating all occupations which affect the good order or public peace; that authority is expressly given. *Pierce's Code*, 1905, § 3732, subds. 34 and 36 (*Bal. Code*, § 1125). But it is argued that the ordinance is unreasonable because it restricts the right of private contract and the use of private property, and that the contract between the railway company and the transfer company is both reasonable and necessary. If there

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were no ordinance prohibiting hack solicitors from soliciting passengers, then the contract limiting the number in the railway station might become necessary. But with an ordinance prohibiting such solicitation, it is not clear how that part of the contract is necessary either for public order or the convenience of passengers, especially where passengers have an opportunity on the trains and at an office in the building to make their wants known and have them cared for without solicitation from others. The fact that the contract is reasonable does not necessarily argue that the ordinance is unreasonable.

"An ordinance to be void for unreasonableness must be *plainly and clearly* unreasonable. There must be evidence of weight that it took inception either in a mistake, or in a spirit of fraud or wantonness on the part of the enacting body." Horr and Bemis, *Municipal Police Ordinances*, § 127.

See, also, *Walla Walla v. Fardon*, 21 Wash. 308, 57 Pac. 796.

The object of the ordinance in question was, no doubt, to protect the traveling public from annoyance by hack drivers, hotel runners, expressmen and others while going to and from boats and trains. It operates as a benefit to these common carriers in the performance of their duties. In this connection the language used by Justice Harlan, in *Donovan v. Pennsylvania Co.*, *supra*, at page 295, is appropriate, as follows:

"Applying these principles to the case before us, it would seem to be clear that the Pennsylvania Company had the right—if it was not its legal duty—to erect and maintain a passenger station and depot buildings in Chicago for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort and safety of passengers and the wants of shippers. It was therefore its duty to see to it that passengers were not annoyed, disturbed or obstructed in the use either of its station house or of the grounds over which such passengers, whether

arriving or departing, would pass. It was to that end—primarily as we may assume from the record—that the Pennsylvania Company made an arrangement with a single company to supply all vehicles necessary for passengers. We cannot say that that arrangement was either unnecessary, unreasonable or arbitrary; on the contrary, it is easy to see how, in a great city, and in a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business."

These are, no doubt, some of the reasons which prompted the enactment of the ordinance in question. The ordinance does not affect the right of the railway or depot company to employ men for itself, or to contract so as to permit one company or person or any number of persons, to care for the comfort or desires of passengers. The ordinance simply prohibits solicitors from soliciting business from passengers at certain times in railway stations, and nothing more. We can see nothing unreasonable in this. On the other hand, the regulation seems to us most reasonable, and cases may readily be imagined where such regulation might be necessary to protect passengers from annoyance and confusion, even where the privilege of such solicitation was confined by contract to one company like the one in this case. If the case of *Napman v. People*, 19 Mich. 352, cited and relied upon by the appellant, holds that a city authorized to regulate all occupations which affect good order may not regulate the occupation of hack drivers within railway stations, then we do not desire to follow that case. We prefer to follow the case of *Chillicothe v. Brown*, *supra*, which holds the opposite view.

The ordinance regulating hack solicitors, etc., in depots was passed after the contract above set out was entered into. Appellant argues that the ordinance, therefore, impairs the obligation of the contract, and is void for that reason. This does not follow, because

"The ordinance is a valid exercise of the power with which

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the municipal authorities were clothed; a power intended for the protection of the public and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby pre-existing private rights are restrained or limited, the restraint or limitation is *damnum absque injuria*."

All contracts are subject to this power, the exercise of which is neither abridged nor delayed by reason of existing contracts. *Lindsay v. Anniston*, 104 Ala. 257, 16 South. 545, 58 Am. St. 44, 27 L. R. A. 436.

For these reasons we think the ordinance is reasonable, is a valid exercise of police power, and that the railway company or the depot company may not enter into a contract which nullifies the provisions of the ordinance. The judgment appealed from must therefore be affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, and CROW, JJ., concur.

[No. 7215. Decided September 28, 1908.]

F. C. ROBERTSON *et al.*, Respondents, v. P. C. SHINE,
Appellant.¹

APPEAL—DECISIONS REVIEWABLE—FINALITY—PREMATURE APPEAL.
An appeal from the oral announcement of the judge's conclusions, made at the end of a trial without a jury, will be dismissed as premature, since it is not a final judgment until expressed in writing.

Appeal from a decision of the superior court for Spokane county, Poindexter, J., made February 27, 1907, in favor of the plaintiffs, after a trial on the merits before the court. Appeal dismissed.

Harris Baldwin, *O. J. Saville*, and *P. C. Shine*, for appellant.

A. G. Gray and *Robertson & Rosenhaupt*, for respondents.

¹Reported in 97 Pac. 497.

PER CURIAM.—This case was tried by the court without a jury. At the conclusion of the evidence, the judge presiding announced his conclusions as the case then appeared to him, stating at the same time that he would permit the defendant, if he so desired, to amend his answer and offer further evidence concerning a counterclaim against one of the plaintiffs he had mentioned in his defense. The defendant thereafter gave the statutory notice, and moved for a new trial of the entire action, which motion the court overruled. He thereupon gave a written notice of appeal, reciting therein that he appealed from “the judgment and decision . . . in favor of the said plaintiffs and against said defendant, announced and rendered on the 27th day of February, 1907, and from the whole thereof,” meaning the oral announcement made by the court at the conclusion of the trial. No formal judgment had then been entered, and none was entered subsequent to that time.

The respondent moves in this court to dismiss the appeal on the ground that it is premature, as no final judgment has been entered in the cause. The motion must be granted. In the absence of an express statute permitting the practice, no appeal will lie from intermediary orders made by the court, nor from rulings and decisions not expressed in a final judgment. We have no statute permitting an appeal from a decision such as was here made by the court. The so-called judgment was nothing more than an announcement of the court of its conclusions from the evidence, which must be expressed in a formal written judgment before it becomes binding upon either party. As no such judgment was entered there is nothing from which an appeal can be taken.

The condition is not met by the case of *Hays v. Dennis*, 11 Wash. 360, 39 Pac. 658. The oral announcement made by the court in that case was followed by a formal written judgment, and this court declined to dismiss the appeal merely because the notice of appeal was given between the oral an-

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nouncement and the entry of the formal judgment. Conceding the case to be sound, it is not authority for an appeal in a case where no final judgment at all has been entered.

The appeal is dismissed.

[No. 7344. Decided September 23, 1908.]

KATHERINE SCHILLREFF, *Appellant*, v. CONEATH
SCHILLREFF *et al.*, *Respondents*.¹

ESTOPPEL—TO ASSERT TITLE—LACHES—HUSBAND AND WIFE—COMMUNITY PROPERTY. A wife is estopped from asserting a community property interest in land for which her husband held a contract of purchase from a railway company, where, in 1897, the husband sold and assigned the contract to a third person who took possession and made valuable improvements, and it appears that the wife knew of the assignment and was satisfied with the money received therefrom, they being unable to complete the payments, and in subsequent divorce proceedings against her husband, she set forth a description of property owned by him without mention of this land, and made no claim thereto at that time or for many years thereafter while the purchaser was making improvements and paying for the property, nor until the railroad company issued a deed therefor to the purchaser.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered August 7, 1907, upon findings in favor of the defendants, after a trial before the court without a jury, in an action of ejectment. Affirmed.

Gallagher & Thayer, for appellant.

O. R. Holcomb and *Lovell & Davis*, for respondents.

Root, J.—This is an action by appellant to establish her ownership to an undivided half interest in a certain section of land, in Adams county, and to recover possession thereof. The case was tried by the court without a jury, and resulted

¹Reported in 97 Pac. 457.

in findings and conclusions and a decree favorable to defendants. From this decree, the plaintiff appeals.

On the 15th of January, 1897, and for many years theretofore, plaintiff and respondent Schillreff were husband and wife, and on that day respondent Schillreff entered into a contract with the Northern Pacific Railway Company for the purchase of the land in question, and made the first payment thereon. Schillreff and wife took possession of the property and made some improvements. On October 28, 1897, respondent Schillreff made an assignment of this contract to respondent Jacob Hardung, who then took possession of the land and has ever since been in possession thereof, denying that appellant had any right thereto. In the January following, respondent Schillreff deserted appellant, and the latter subsequently obtained a divorce from said respondent. In her complaint in the divorce action she set forth a description of property as owned by herself and husband, which description did not cover the property here in question, and no allusion was made in said proceeding to such property, and no claim to the same interposed, and no decision made in any way referring to the same.

Respondent Hardung, after the assignment of the contract, completed the payments provided for therein and, after full payment had been made, received the deed for the land from the railway company. He and his wife built a house and barn on said premises, and otherwise improved and made the same valuable. Their possession and improvement of the property were at all times well known to appellant. It is urged by the latter, however, that the land was community property, and that her husband had no right to make the assignment of the contract therefor to respondent Hardung, and that she now has a right to recover an undivided one-half interest therein. Respondents urge that she is estopped from putting forth any claim to the land at this time. The trial court reached the conclusion that she was so estopped,

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and that the respondents Hardung and wife were entitled to a decree quieting their title in and to the land.

We think this conclusion was correct. Although conflicting, we think the evidence shows satisfactorily that the appellant knew of the assignment of the contract at the time that it was made, and sanctioned the same; that she and her husband were short of money at that time, and could probably not have made the payments that were soon to become due thereupon; that shortly after the assignment, she expressed herself as highly gratified at being able to sell the contract and get some money therefor, inasmuch as they otherwise would have been unable to meet the payments, and would have lost the entire property with what they had paid thereon. The money paid by Hardung went to appellant's husband and presumably to and for the benefit of the community composed of himself and appellant. The fact that in the divorce proceeding she made no mention of this property tends to show that she then made no claim to the same, and had no idea that she had any interest therein. In the light of these circumstances, and of the fact that she stood by so many years while respondent Hardung and wife were occupying and improving this land and paying for the same to the railway company and in every way treating it as their own, we think she is, and should be, estopped at this time from asserting any claim to the premises.

The judgment of the superior court is affirmed.

HADLEY, C. J., CROW, and MOUNT, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

[No. 7296. Decided September 28, 1908.]

H. A. HUNTER *et al.*, *Respondents*, v. WENATCHEE LAND
COMPANY, *Appellant*.¹

BROKERS—CONTRACTS—CONSTRUCTION—“EXCLUSIVE AGENCY”—BREACH—DAMAGES. A contract whereby the owner gave the “exclusive agency” to sell land does not imply a reservation of the right of the owner to make sales, as in the case of a unilateral contract, where it appears that the parties were nonresidents and the land consisted of over fifty thousand acres, that the contract gave the second party, who made a specialty of such sales, the exclusive right to make sales for a period of three years, in consideration of which the second party agreed to put forth his best efforts to sell and agreed to pay all costs of advertising and sale and apply the proceeds, (1) to the payment of taxes (2) \$1.52 per acre to the owner, and (3) the balance to be equally divided, the second party to receive no other compensation or commission; hence the contract is broken by the owner's sale, within the three years, of the standing timber thereon, preventing the second party from making any sales, the land being chiefly valuable for its timber.

SAME—BREACH OF CONTRACT—ACTIONS—TIME FOR COMMENCEMENT. Where a party has put it out of its power to perform a contract relating to the sale of property, by selling the same, the second party may recover damages for the breach without waiting until the time of the expiration of the contract.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered September 24, 1907, upon the special verdict of a jury in favor of the plaintiff, after a trial on the merits, in an action for damages for breach of contract. Affirmed.

Will H. Thompson, Happy & Hindman, and Chas. A. Murray, for appellant.

Graves, Kizer & Graves, for respondents.

DUNBAR, J.—The plaintiffs are residents of the state of Minnesota, and the defendant is a Minnesota corporation and a resident of said state. On the 10th day of May, 1902,

¹Reported in 97 Pac. 494.

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at the city of Minneapolis, in the said state of Minnesota, they entered into the following contract:

"This agreement made and entered into this 10th day of May, A. D. 1902, by and between Wenatchee Land Company, a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota, and having its office and principal place of business in the city of Minneapolis, county of Hennepin and state of Minnesota, party of the first part, and H. A. Hunter and J. A. Young, both of the city of Minneapolis, county of Hennepin, and state of Minnesota, parties of the second part:

"Witnesseth as follows, whereas, the party of the first part is the owner of certain lands situated in the county of Chelan, state of Washington, aggregating 51,451.23-100 acres (which said lands are to be hereafter more particularly described by a separate instrument to be hereto attached and to become a part of this agreement).

"Whereas, the parties of the second part made a specialty of the sale of such lands and premises and are willing to undertake the sale of the same,

"Now, this agreement witnesseth, that in consideration of the premises and the sum of \$1.00, by each to be to the other paid, the receipt of which is hereby acknowledged, the party of the first part grants unto the parties of the second part, the exclusive agency for the sale of said lands for the period of three years from date hereof.

"Said parties of the second part are hereby authorized to sell said lands, or any part thereof, at not less than two and 52-100 dollars (\$2.52) per acre, except in cases where the said first party shall consent in writing to the sale of some or all thereof at a less rate per acre, provided, that each purchaser of land shall make a first payment in cash of not less than fifteen per cent of the total purchase money and that all contracts of sale shall be executed by the party of the first part and upon the request of said second parties.

"Said parties of the second part are to give reasonable time and attention to the management and sale of said lands to have same examined and advertised, and to report promptly all sales as soon as made, and to faithfully account on the first of each calendar month to said party of the first part for all proceeds that may be derived from such sales, it being

mutually agreed that the proceeds derived from the sales of said lands shall be applied as follows:

"(1) To the payment of taxes if any accrued upon said lands.

"(2) To the payment to said party of the first part of the sum of one and fifty-two hundredths dollars (\$1.52) per acre, together with interest thereon at the rate of six per cent per annum from the date of this contract, being the sum of seventy-eight thousand two hundred five and 87-100 (\$78,205.87) dollars, and interest.

"(3) The remainder of said proceeds arising from said sales shall be divided equally and one-half thereof shall be paid to the said party of the first part, its successors or assigns, and the remaining one-half thereof shall be paid to the said parties of the second part, their heirs, executors or assigns.

"The party of the first part agrees to deliver good title discharged from all liens by way of mortgage, taxes, or otherwise, to any portion of said premises that may be sold, and will, at the time of making any contract of sale, discharge all the liens upon the land contracted to be sold.

"It is understood and agreed that said parties of the second part shall have no right or claim against the said party of the first part or on said lands or any part thereof, for commission, expenses or otherwise, except only for his one-half share of the profits arising from sales of said lands as hereinbefore provided and agreed. (Signed and witnessed.)"

The complaint alleges, the execution of the contract; that the plaintiffs proceeded to carry out the terms thereof by attempting to sell said real estate, and especially to sell the timber growing thereon, and in order to accomplish such sale caused the land to be examined and advertised at large expense to themselves; that they would have made a sale of said real estate within the time prescribed in the contract had it not been for the fact that the defendant entered into a contract in writing with Gullede Brothers for the sale to said Gullede Brothers of all the standing timber upon said real estate, and that, by reason of said sale, the plaintiffs were prevented from carrying out the terms of their contract with

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the defendant, and hence this action for damages. The answer of the defendant corporation admits the making of the contract set forth in the complaint; admits the making of the Gulledge contract, and the sale thereunder; alleges that plaintiffs did nothing in pursuance of the terms of the contract, and that upon the making by the defendant of the contract with the Gulledges, the plaintiffs abandoned their contract and brought their action for damages.

The jury, in answer to the following special interrogatory: "Would the plaintiffs have sold the tract of real estate or a portion thereof described in the complaint, within three years from the 10th of May, 1902, if the contract had not been broken by the defendant?" answered: "Yes." They also found, in answer to a special interrogatory, that plaintiffs would have sold the land in question for \$146,000 if they had not been prevented by the selling of the timber to the Gulledges; and also found that, prior to the commencement of this action, the defendant had repudiated its contract, and that the land in question was chiefly valuable for timber. These findings are justified by the record.

A demurrer was interposed to the amended complaint, which was overruled. A demurrer was sustained to the affirmative matters in the amended answer. Upon trial, a verdict was rendered in favor of respondents for the sum of \$51,674.40, which was reduced by the court to \$26,159.34, and was accepted by the respondents in that amount.

It is urged that the court erred in overruling defendant's demurrer to plaintiffs' amended complaint, in sustaining plaintiffs' demurrer to defendant's answer, in overruling the defendant's objection to the introduction of any testimony in behalf of plaintiffs under the amended complaint, in denying defendant's motion for an instructed verdict, and in refusing certain instructions asked by it. These assignments may all be considered together, for they are all based upon the construction which the appellant placed upon the contract.

It is the contention of the appellant that, under the law, and especially the law of Minnesota under which the contract was entered into, the appellant only bound itself not to employ rival agents, but reserved to itself the right to make a sale of the whole or any part of said property without liability to the respondents; that therefore there was no breach of the contract on the part of the appellant upon which a suit for damages could be based, and that the use in the contract of the words "exclusive agency" implies the reservation of the right to sell on the part of the appellant. Several Minnesota cases, and some cases from other jurisdictions, are cited to sustain this contention.

An examination of the cases cited, and especially of the Minnesota cases, convinces us that the broad doctrine contended for by appellant was never intended to be announced, although there may be some dictum in some of the cases which would lend color to such contention. But when the circumstances of the cases cited are investigated, that idea is dispelled, and it is found that such language was used in cases involving unilateral contracts; that the rule does not apply to the construction of mutual contracts, as in this case, and that the courts, even of Minnesota, never intended to depart from the well-established general rule, that the intent of the parties to be gathered from the words used must govern; that the whole contract must be construed together for the purpose of defining certain words used therein; and that, as announced in 9 Cyc., § 587, to determine the intention of the parties if the meaning is not clear, it is necessary that regard should be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view, for which purpose parol evidence is admissible.

Notwithstanding the use of certain set expressions, such as "exclusive agency," it is impossible to view this contract in the light of all the circumstances surrounding it, the condition of the parties, and the obligations assumed by the re-

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spondents, and conclude that it was the intention that the fruits of all the labor and money expended by the respondents in an honest attempt to carry out the terms of the contract should be appropriated by the appellant; and that is what the testimony in this case shows was done or attempted to be done. That there was, in substantial effect, a breach of the contract on the part of the appellant is evident, for while technically there may be no breach of the contract until after the time for performance has expired, yet when one party to the contract has by his own acts disqualified himself or placed it beyond his power to perform, there is neither sense nor justice in compelling the injured party to await the time of the expiration of the contract. We held in *Munson v. McGregor*, 49 Wash. 276, 94 Pac. 1085, that where, pending the performance of a contract for the sale of land, the subject-matter of the contract is conveyed to a third party, the contract is thereby breached, and the vendee may maintain an action to recover damages for such breach. In this case, although the land itself was not sold, the timber—which was the most valuable part of the land—was sold, which practically prevented the sale of the land according to the terms of the contract.

There seems to be no merit in appellant's case, either under the law or the facts. Affirmed.

RUDKIN, ROOT, FULLERTON, and CROW, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7853. Decided September 29, 1908.]

JAMES C. MURRAY *et al.*, *Respondents*, v. SEATTLE ELECTRIC
COMPANY, *Appellant*.¹

CARRIERS—NEGLIGENCE—SETTING DOWN PASSENGERS. Whether a street railway company is guilty of negligence in stopping its street car for a passenger to alight, on a dark night, directly over an excavation for a sewer, of which it had notice, is a question for the jury, where there was evidence that the passengers on the car saw the hole, although the motorman testified that it was so dark he could not see it, and stopped his car with reference to a red light that had marked the place, but which had been moved without his knowledge, and the evidence being conflicting.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 3, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger alighting from a street car. Affirmed.

James B. Howe and *A. J. Falknor*, for appellant.

McClure & McClure, for respondents.

Crow, J.—Action by James C. Murray and Frances L. Murray, husband and wife, against the Seattle Electric Company, a corporation, the city of Seattle, George W. Walker, and Jane Doe Walker, his wife, for damages for personal injuries sustained by the plaintiff Frances L. Murray. Before trial the plaintiffs voluntarily dismissed the action as to the defendant the city of Seattle. On a jury trial, a verdict for \$2,000 was returned in favor of the plaintiffs against the defendant the Seattle Electric Company, and a verdict in favor of the defendants Walker and wife was returned against the plaintiffs. From the judgment in favor of the plaintiffs and against the Seattle Electric Company, entered upon the verdict, the Seattle Electric Company has appealed.

¹Reported in 97 Pac. 458.

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Opinion Per CROW, J.

Appellant's first contention is that the trial court erred in entering judgment against it for \$2,000, or for any part thereof, for the reason that the evidence fails to show that it has been guilty of negligence. From the evidence it appears that, about 10 o'clock on the evening of October 31, 1905, the respondent Frances L. Murray and her mother took passage on one of the appellant's street cars, to return to their home; that the car, which was open at both ends, was provided with outside seats; that it was also provided with inside seats in its middle or inclosed portion where Mrs. Murray and her mother rode; that Mrs. Murray endeavored to alight at the intersection of Tenth avenue north and East Prospect street, where the conductor, upon her request, signalled the motorman to stop, and she left the inner portion of the car, stepped to the rear, attempted to leave the car on the west side, but dropped into an open hole about six feet in diameter and seven or eight feet deep, thereby sustaining the injuries of which she now complains. The evidence further shows that the city of Seattle had entered into a contract with the defendant George W. Walker for the construction of a sewer system along Tenth avenue North; that, in the progress of this work, Walker had caused the hole to be excavated; that when his employees ceased work on the evening of October 31, they covered the hole with planks and lit and placed a red lantern almost immediately over it, as a signal of danger; that there were other excavations in the immediate locality pertaining to the sewer construction, and that on the east side of the car line the appellant itself had made an excavation in grading for an additional track. There is no question but that appellant's servants stopped the car with its steps directly over the hole, so that in the darkness a passenger in the act of alighting would be in imminent danger of stepping into the hole, just as Mrs. Murray did.

The appellant contends that it was not guilty of negligence, for the reason that the motorman had carefully noticed the location of the red light immediately over the manhole;

that he had on previous trips stopped the car some distance to the south thereof, at a point where ties or planks had been laid across Tenth avenue for the use of teams and pedestrians, and where it was perfectly safe for passengers to alight; that after his last preceding trip, the light had been moved further north to a different location, and the planks had been taken from over the hole without his knowledge; that he stopped his car with reference to the light as moved; that he exercised due care in so doing, and that the accident happened without negligence on the part of appellant or any of its employees. Under the evidence, which was conflicting, we are unable to hold, as a matter of law, that the appellant was not chargeable with negligence. The motorman testified that, situated as he was, he could not see the hole at the time of the accident, and that in stopping his car he was guided entirely by the red lantern. Passengers riding on the outer portions of the car did see the hole, and one of them attempted to warn the respondent of its presence and of her danger; but the warning came too late. The respondent testified that, on coming from the inner portion of the lighted car, she could not, or did not, see the hole before stepping into it. It is the duty of a carrier to provide a safe place for its passengers to disembark. The locality in which the respondent wished to leave the car was, by reason of the improvements in progress, an exceedingly dangerous one, and particularly so during the night season. While it is true that the respondent, who resided in the immediate neighborhood, had some knowledge of the unsafe condition of the street, she nevertheless had a right to expect that the appellant, having the same knowledge, would perform its duty in so stopping the car as to provide her with a safe place for alighting. This it did not do, and under all the evidence it was for the jury to determine whether the appellant was guilty of negligence in failing to perform such duty, and also to determine whether the respondent was guilty of contributory negligence as pleaded and claimed by appellant. By its verdict the jury

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determined both of these issues in favor of the respondent and, under the conflicting evidence, we are without authority to reverse their decision.

The appellant further contends that excessive damages have been awarded. We have carefully examined all the evidence bearing upon this proposition and, without discussing the same in detail, will say that, although the damages awarded appear to be ample compensation to the respondent for her injuries, we do not find them so excessive as to justify us in disturbing the judgment; especially so in view of the fact that the same question was raised in the lower court, and that the trial judge, who saw the witnesses and heard them testify, declined to make any reduction.

The judgment is affirmed.

RUDKIN, MOUNT, and ROOT, JJ., concur.

HADLEY, C. J., and FULLERTON, J., took no part.

[No. 7442. Decided September 29, 1908.]

SADIE SILVERSTONE *et al.*, Respondents, v. B. T. TOTTEN
et al., Appellants.¹

TAXATION—PROCESS—SUMMONS FOR PUBLICATION—SUFFICIENCY—STATUTES—CHANGE IN LAW—PENDING PUBLICATION. A summons for publication in a tax foreclosure, requiring appearance within sixty days after service of the summons, complying with the law existing at the time of the service, is void where before the service was complete, a new law took effect, providing that the summons require appearance within sixty days after the date of the first publication of the summons; as the new law governs in matters of procedure.

JUDGMENTS—RECITALS—PROCESS—PRESUMPTIONS—DIRECT ATTACK. A recital in a judgment of due service of a summons is not conclusive where the judgment is directly attacked by an action in equity to set it aside; and an unquestioned finding that none but a defective service was made overcomes the presumption of regularity raised by the recital.

¹Reported in 97 Pac. 491.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 19, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to set aside a tax title. Affirmed.

I. H. Randolph, for appellants.

Edward Judd, for respondents.

HADLEY, C. J.—This is an action to avoid certain tax foreclosure proceedings and all conveyances thereunder, affecting lot 41, block 2, Union Depot Addition to South Seattle, in the city of Georgetown. The land belonged formerly to John P. Lynn, a nonresident of the state of Washington. In the year 1900 a certificate of delinquency was issued by the county treasurer to B. T. Totten, for taxes upon the land for the year 1896 and prior years. In due time Totten brought suit to foreclose the lien of the certificate, and procured a decree of foreclosure. This was followed by a sale and the issuance of a tax deed to Totten. This tax title was purchased by King county, the land to be used as a part of a highway, and its municipal successor, the city of Georgetown, now holds it as a street. At the time of the foreclosure proceedings, the fee simple title was in Lynn, under whom the plaintiffs in this action take title. The complaint asks that the foreclosure proceedings and all conveyances thereunder shall be held to have been void, and that the plaintiffs' title shall be quieted as against the same.

The court found at the trial of this action that Lynn was never actually served with process in the foreclosure suit, and that he had no actual knowledge of the pendency thereof, but that an attempt was made to serve him by publication summons, which summons commanded him to appear "within sixty days after the service of this summons upon you exclusive of the day of service." The first publication was made February 21, 1901, and the last April 4, 1901. Judgment was entered June 22, 1901, seventy-eight days after the last

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publication. The decree contained the recital in effect that service of the complaint and notice was duly made according to law. The files and records in the foreclosure suit show nothing touching the service of process upon Lynn save the attempted service by publication and the aforesaid recital in the decree. The court entered judgment for the plaintiffs herein, holding the foreclosure proceedings and the conveyances thereunder to be void, and that plaintiffs' title should be quieted as against the same. The defendants have appealed.

No statement of facts has been brought to this court, and the findings of the trial court therefore establish the facts in the case. It will be remembered that the publication of the foreclosure summons covered the period from February 21 to April 4, 1901. The summons as published was in conformity with the law existing at the time the publication began. Pending the period of publication, however, the legislature passed an act amending the law upon the subject of the summons in tax cases. Laws of 1901, p. 383, ch. 178, § 1, subd. 2. It will be observed that the new law required the summons when published to direct the appearance within sixty days after the date of the first publication of the summons, exclusive of such first day, whereas the summons that was published called for an appearance within sixty days after service of the summons, exclusive of the day of service. The new law contained an emergency clause, and was approved by the governor March 20, 1901, taking effect some two weeks before the completion of the publication period. Under such circumstances, this court held, in *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536, that the new law governs in this matter of the sufficiency of the summons, as it relates to procedure only. The summons did not conform to the new law and was therefore void. Appellants concede that the summons described was insufficient but they make the contention that, inasmuch as a period of seventy-eight days elapsed between the time

of the close of the publication period and the entry of judgment, there was ample time to have published a new summons in conformity with the new law, and that inasmuch as the decree recited that the notice was regularly and duly served, it should now be presumed that such a new publication was made. It may be true, under the decisions of this court, that such a presumption should prevail as conclusive in a case of a collateral attack on a judgment. But it cannot be conclusive when the judgment is directly attacked. In the latter case the judgment is entitled to the presumption in its favor in the first instance, but that may be overcome by proof. This action is a direct attack upon the foreclosure judgment. It is a suit in equity for the express purpose of avoiding the judgment and the proceedings thereunder. The trial court, after describing in its findings the aforesaid defective summons, further found that "no other summons or process notifying him of the pendency of said suit was ever served upon said John P. Lynn." For reasons already stated the above finding must be accepted as a fact in this case, and it destroys the presumption in favor of any service in the foreclosure suit.

The judgment is affirmed.

RUDKIN, FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

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[No. 7415. Decided September 20, 1908.]

DANIEL O. PRESTON *et al.*, *Appellants*, v. A. H. COX *et al.*,
Respondents, H. B. KENNEDY *et al.*, *Defendants*.¹

TAXATION — FORECLOSURE — NOTICE — SUFFICIENCY — NAME OF DECEASED OWNERS. A tax foreclosure judgment is void where the notice in foreclosure did not give the name of the owner to whom the property was assessed on the tax rolls, who was dead, but was directed to two descendants who, also, were dead at the time; since it failed to state either the name of the person to whom the property was assessed or the name of the owners; it being sufficient to give notice in the name of the person to whom the property was assessed, whether alive or dead, and unnecessary to name the present owners.

QUIETING TITLE — EVIDENCE OF TITLE — JUDICIAL PROCEEDINGS — TAXATION. A distribution in probate proceedings of the property of the deceased to his heirs is some evidence of title, without deraignment of title from the government, and sufficient to support a judgment removing the cloud of tax foreclosure proceedings against land assessed to the deceased, as to parties claiming through the same source.

Appeal from a judgment of the superior court for King county, Yahey, J., entered January 24, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action to set aside a tax title. Reversed.

Edward Judd, for appellants.

A. E. Parker and *A. C. MacDonald*, for respondents.

HADLEY, C. J.—This is an action to set aside certain tax foreclosure decrees, and to remove the cloud of all proceedings thereunder. Certificates of delinquency were issued for the several lots concerned to H. B. Kennedy, for the unpaid taxes of 1896 and prior years. The name of the owner upon the tax rolls at the time the taxes were assessed was L. M. Ordway, and each of the certificates of delinquency showed that the property was so assessed. In the suits to foreclose the liens of the certificates, L. M. Ordway was not named in

¹Reported in 97 Pac. 493.

the notices or summonses. She was dead at the time, a fact which was then known to the plaintiff in the foreclosure suits. Under probate proceedings in the estate of L. M. Ordway, the lots in question were, by decree of distribution, distributed to F. E. Ordway and Ellen Preston. In the foreclosure suits the said distributees were named as defendants in the notices, but they were both dead at the time, a fact then unknown to the holder of the certificates. The foreclosure proceedings are attacked here on the ground that the notices were insufficient under the statute to confer jurisdiction upon the court. The plaintiff in this action, D. O. Preston, has acquired the interest which was distributed under the probate proceedings and, claiming to be the community owners thereof, he and his wife have brought this action. The court gave judgment against the plaintiffs, and they have appealed.

The record of the tax title foreclosure presents a peculiar situation. The tax record owner was dead, and was not named in the notices. It was held in *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385, that, inasmuch as the tax foreclosure proceeding is purely one *in rem*, it is the intention and policy of the statute that the notice is sufficient when it is directed to the tax record owner and to all persons unknown, if any, having an interest in the property. It was also held in *Sherman v. Schomber*, 43 Wash. 330, 86 Pac. 569, that a publication summons addressed to the person appearing on the tax rolls as owner is sufficient, although such person is dead at the time.

It is contended, however, that it has never been held that it is sufficient to name a tax record owner who is dead when the fact of such death is known to the certificate holder. Such a question has not been directly passed upon by this court, so far as we are advised. We think, however, that knowledge of the death is an immaterial factor. The purpose of the statute is to establish some standard by which a certificate holder may require all persons interested in the property to take notice of the pending procedure to fore-

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close. As we said in *Williams v. Pittock*, *supra*, he is not required to determine in advance who may be the owner in fact—a difficult and hazardous thing to attempt in many cases. By describing the name used in the tax records when the tax was assessed, and by so directing the notice, he may require all interested persons to take notice. The notice is not for the purpose of acquiring jurisdiction of any particular person, but rather of the property only, and when the assessment record is identified and the notice clearly and properly specifies the name used in that record as owner, then the real owner, who is charged with knowledge of who was the tax record owner, must take notice that the proceeding affects his land. It therefore becomes immaterial whether the person named as the tax record owner be living or dead at the time. The purpose of using his name is simply to identify a record upon which the proceeding is founded, and of the existence of which the real owner must legally know. The notices in the foreclosure suits in question were directed to two persons who were dead, and who were therefore not the real owners at the time. Inasmuch as neither the tax record owner nor the real owner was named, there was no process upon which the court was authorized to proceed.

Respondents, however, contend that the judgment was right in this case, for the reason that appellants did not show a deraignment of their title from the United States government. The court found, however, that the property was regularly distributed by probate proceedings, and that the appellants have acquired the property so distributed. We think the distribution of the property by the probate court to the heirs of the deceased Ordway, from whom appellants derive title, was such a judicial determination as must be accepted as evidence of some title. It is a higher class of proof than would be a mere deed from an individual grantor who might be a stranger to the title, and we think it shows sufficient title to enable the holder thereof to ask the removal

of a cloud created by court proceedings not founded on jurisdictional process. The probate proceedings were upon the estate of the same person who owned the land when the assessment was made through which respondents claim. Both, therefore, claim title from a common source, and the proof was sufficient to enable appellants to prosecute the action against these respondents.

The record shows that before the commencement of this action all taxes, penalties, interest, and costs were tendered to respondents, as provided by law. The judgment is, therefore, reversed and the cause remanded with instructions to enter judgment for appellants as prayed in their complaint, upon their paying into court the amount of the tender for the use and benefit of the respondents.

RUDKIN, FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

[No. 7629. Decided September 29, 1908.]

ROBERT KATH, *Appellant*, v. HISTOGENETIC MEDICINE
COMPANY, *Respondent*, S. L. BROWN, *Defendant*.¹

APPEAL—TIME FOR TAKING—FINAL ORDERS. An order dismissing a petition to vacate a judgment for fraud in obtaining the same, is a final order made after judgment affecting a substantial right; and therefore an appeal need not be taken within the fifteen days limited for other than final orders, and is in time if taken within ninety days.

Motion to dismiss an appeal from an order of the superior court for King county, Morris, J., entered May 6, 1908, dismissing an application to vacate a judgment. Denied.

J. L. Finch, for appellant.

J. C. Allen, for respondent.

¹Reported in 97 Pac. 464.

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PER CURIAM.—The respondent moves to dismiss the appeal in this case. It appears that the appellant filed a petition in the court below to vacate a judgment rendered in favor of the defendants in an action by the appellant against S. L. Brown, defendant, and the Histogenetic Medicine Company, intervener, for fraud alleged to have been practiced in obtaining the judgment. Upon a trial the court denied the petition, and the petitioner appeals.

The order denying the petition was entered on May 6, 1908. Notice of appeal was given on August 4, 1908. It is claimed by the respondent that the appeal should have been taken within fifteen days. The statute provides, at subd. 7 of § 6500, Bal. Code (P. C. § 1048), that an appeal may be taken "from any final order made after judgment which affects a substantial right." There can be no doubt that the final order in this case comes within this provision, if it is not a "final judgment" within the meaning of subd. 1 of the same section. Bal. Code, § 6502 (P. C. § 1050), provides:

"In civil actions and proceedings an appeal from any final judgment must be taken within ninety days after the date of the entry of such final judgment; and an appeal from any order, other than a final order, from which an appeal is allowed by this act, within fifteen days after the entry of the order, . . ."

It seems clear that the fifteen-day limitation for taking appeals applies to interlocutory orders, and that the ninety-day limitation applies to final judgments and final orders which determine the action. The statute under which *Braely v. Marks*, 13 Wash. 224, 43 Pac. 27, was decided was materially different from the one now in force.

The motion to dismiss the appeal must therefore be denied.

[No. 7259. Decided September 29, 1908.]

JOHN STORSETH, *Appellant*, v. FRANK H. FOLSOM,
Respondent.¹

FRAUD—DAMAGES. The measure of damages for obstructing a logging road built partly on the lands of another in reliance upon fraudulent representations by defendant that he was the owner of the land, includes only that portion of the road built on the land in question, or at most, the part of the road that was rendered valueless by the obstructions.

DAMAGES—EVIDENCE—SUFFICIENCY—TRIAL—NONSUIT. In an action for damages for obstructing portions of certain logging roads, the measure of which was plaintiffs expense in building the portions of the roads obstructed, a nonsuit is properly ordered where the only evidence of damage was the entire cost of building the roads, and plaintiff persistently refused to give any evidence or estimate of the cost of the portions of the road in question.

APPEAL—REVIEW—HARMLESS ERROR—DAMAGES. In an action for substantial damages, it is not prejudicial error to grant a nonsuit where the plaintiff was entitled to only nominal damages.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 29, 1907, granting a nonsuit at the close of plaintiff's testimony, in an action in tort. Affirmed.

Russell R. Farrell, for appellant.

Kerr & McCord, for respondent.

RUDKIN, J.—This case was before this court on a former appeal where a statement of the issues will be found. *Storseth v. Folsom*, 45 Wash. 374, 88 Pac. 632.

The substance of the allegations of the complaint is that the plaintiff was the owner of a certain forty-acre tract of timber land, in Kitsap county, and was engaged in the logging business; that the defendant falsely and fraudulently represented that he was the owner of a certain fractional

¹Reported in 97 Pac. 492.

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twelve-acre lot lying between the land so owned by the plaintiff and the waters of Hood's Canal; that in his logging operations it became necessary for the plaintiff to construct a logging road across this twelve-acre lot, in order to drive his timber products to market by way of Hood's Canal; that, for a suitable and proper consideration, it was agreed between the plaintiff and the defendant that the plaintiff should be granted the right and privilege to construct and maintain a logging road over the twelve-acre lot for the purposes aforesaid; that, relying on the representations and promises so made, the plaintiff constructed said logging road at a cost of \$756.66; that in truth and in fact the defendant was not the owner of said twelve-acre lot, and the representations so made were false and untrue; that thereafter the defendant rescinded the license so granted, and obstructed and closed said logging road over said twelve-acre lot; that, in order to reach the waters of Hood's Canal, the plaintiff was compelled to, and did, construct a second logging road around said twelve-acre lot at a cost of \$694.19. The complaint prayed judgment for the sum of \$1,450.85, being the aggregate cost of constructing both roads.

On the former trial, an objection to the introduction of testimony under the complaint was sustained, and a judgment of nonsuit entered. That judgment was reversed on appeal to this court. *Storseth v. Folsom, supra*. On the trial from which the present appeal is taken, a nonsuit was again granted at the close of the plaintiff's testimony, and the plaintiff has again appealed.

The chief contention of the appellant is that the court on the second trial disregarded the rulings of this court on the former appeal. The record does not sustain this contention. The appellant seems to contend that on the former appeal this court not only ruled that the complaint stated a cause of action in his favor, but that he was entitled to recover the several items of damage therein claimed. From the foregoing statement of the case, it will appear that the appellant

asserted the right to recover the cost of constructing both roads. Such contention is wholly without merit, and this court announced no such measure of damages on the former appeal. A majority of the court did hold that the appellant was entitled to recover the damages sustained by him by reason of his reliance upon the representations and promises made by the respondent. This would include the moneys expended in the construction of that portion of the road lying within lot 12, or at most that portion of the road which was rendered valueless by the obstructions placed upon lot 12. An examination of the record convinces us that the court admitted all competent testimony bearing upon that issue.

The testimony of the appellant is in a measure unintelligible, as he often refers to points and places such as "here" and "there," while the record does not disclose the points or places referred to; but a reference to the plat offered in evidence by the appellant shows that the first roads and their branches, constructed by him over lot 12 and the forty-acre tract owned by him, were about two hundred and fifty rods in length, assuming that the plat is drawn according to scale. Of these roads and branches, approximately fifty rods were constructed on the twelve-acre lot and two hundred rods on the land owned by the appellant himself. After the first roads were obstructed on the twelve-acre lot, the appellant constructed a second system of roads over his own land, and around the north end of the twelve-acre lot. These second roads intersected the first roads at a point on the appellant's land about fifty rods from Hood's Canal. The only obstructions placed on the first system of roads was on the twelve-acre lot, and from this it becomes apparent that the greater portion of the roads first constructed by the appellant was on his own land, was not obstructed by the respondent, and the value and utility of the roads were in no manner impaired or lessened by any act of the respondent. Notwithstanding this fact, the only evidence of damage offered by the appellant was the entire cost of constructing the old

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roads, both on his own land and upon the twelve-acre lot—those which were not obstructed as well as those which were obstructed—and he persistently refused to give any testimony or estimate as to the moneys expended upon, or damages to, those portions of the roads obstructed and rendered valueless. Under this state of facts, there was nothing upon which a verdict could be based or a judgment sustained for more than nominal damages, and the court did not err in withdrawing the case from the consideration of the jury. Whether it should have directed a verdict for nominal damages we need not inquire, as no error can be predicated on its failure so to do. *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063, 8 L. R. A. (N. S.) 783.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

[No. 7193. Decided September 29, 1908.]

GRACE DEATHERAGE PELTON, *Respondent*, v. SUSIE M. SMITH, *as Administratrix etc.*, *Appellant*.¹

WORK AND LABOR—SERVICES IN FAMILY RELATION—AGREEMENT TO PAY—EVIDENCE—SUFFICIENCY. It is not necessary to prove the terms of a direct and positive contract for services performed between parties sustaining a family relationship, and there is sufficient evidence of an agreement to pay for services to sustain a verdict for the plaintiff, where it appears that the plaintiff had lived with the defendant as a child, attending school, but left his family, and thereafter the defendant approached the plaintiff's father offering to complete her education, make her a beneficiary in a life insurance policy and a general heir of his estate, besides boarding and clothing her, if she would return and work for him as housekeeper, bookkeeper, and nurse, that defendant was referred to plaintiff, who had attained majority, who did return and faithfully performed the services mentioned, taking up all her time for five years, without other compensa-

¹Reported in 97 Pac. 460.

tion than that mentioned, that defendant made her a beneficiary in the insurance policy for a time, and that at the end of five years she left him to be married, with his consent.

EXECUTORS AND ADMINISTRATORS—CLAIMS—WORK AND LABOR—AGREEMENT TO PAY BY WILL—ACTIONS—QUANTUM MERUIT. Where services are performed for another under a contract for compensation to be made by will or otherwise upon the death of the employer, who dies without making provision therefor, an action on *quantum meruit* lies against the estate.

SAME—INTEREST—SERVICES—AGREEMENT TO PAY BY WILL. In an action against an estate upon a *quantum meruit* for services rendered under a contract whereby the employer was to make provision therefor on his death, he having failed to do so, interest is recoverable only from the time of his death, and not from the time the employment ceased.

APPEAL—DECISION. Error in instructions as to the date from which interest was to be computed does not require a new trial, where the verdict was for a specific sum and interest, but interest for the proper time will be directed on remanding the case.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered May 16, 1907, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action on contract, establishing a claim against an estate. Modified.

Daniel Needham and Bailey & Sturdevant, for appellant.
Geo. W. Tannahill, for respondent.

FULLERTON, J.—The appellant is the administratrix of the estate of Dr. A. J. Smith, deceased. The respondent presented a claim against the estate for \$3,000 and interest, averring that sum to be due for services performed for Dr. Smith in his lifetime, at his special instance and request, as nurse, bookkeeper and housekeeper, between the dates of February 25, 1898, and February 25, 1903. The claim was rejected by the administratrix, and this suit was instituted to establish the same as a proved claim against his estate.

In her answer, the administratrix denied the performance of the services alleged; and for a first affirmative defense

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averred that the respondent, at the time the alleged services were performed, was a member of the family of Dr. Smith, who stood in *loco parentis* to her, and that any services she may have rendered him was rendered in that relation, without any agreement on his part to pay for them, and without expectation on the part of either of them that such services should be paid for. For a second defense, she pleaded an accord and satisfaction between Dr. Smith and respondent, entered into after the performance of the services ceased, in which the respondent accepted certain personal property and certain money in lieu of any claim she might have against Dr. Smith. The action was tried out on these issues to a jury, and resulted in a verdict and judgment against the appellant, establishing the claim as a proved claim against Dr. Smith's estate.

The evidence tended to show that the respondent first entered Dr. Smith's family in 1893, when she was thirteen years old; that she performed such services around the household as a daughter of a family in ordinary circumstances usually performs, and attended school during the school year, finally graduating from the local high school in the year 1898. Shortly after this she left the doctor's home and returned to that of her father.

Dr. Smith conducted a hospital in connection with his medical practice, and the respondent had shown proficiency as a hospital nurse. He was desirous of having her continue to reside with him, and to that end approached her father and made a proposition to him concerning his daughter's future as an inducement to have her return. The respondent had then reached the age of majority, and the father, without indicating an acceptance of the terms offered, referred the doctor to the respondent. Shortly thereafter he approached the respondent, with the result that she again entered into his service, and continued therein as his housekeeper, bookkeeper, and nurse until sometime in 1903, when she married with the doctor's consent, and left his home for a home of her own.

Dr. Smith died a few months thereafter. The claim presented against his estate was for services rendered during the time she resided in his household after reentering it in 1898.

That the services were faithfully performed and of the value claimed for them, the record abundantly shows. Indeed, at times the respondent's duties were most arduous, leaving no respite other than a few hours for sleep out of the twenty-four, and consisting of the most servile drudgery. So fully was this part of the case proven that but little effort was made to combat it, the defense directing its effort to show that the services were rendered while the doctor and the respondent sustained the relation of parent and child, without promise of remuneration on the one side or expectation of receiving it on the other, and to the second defense, namely, that such pecuniary differences as did exist between them were mutually settled during the doctor's lifetime.

The evidence as to the agreement between the doctor and the respondent, made at the time she entered his household the second time, is, from necessity, indirect and circumstantial. It seems not to have been overheard by any third person, and the respondent could not testify concerning it because of the statute. Its nature, however, is clearly indicated by the indirect and circumstantial evidence. The father testifies that, at the time the doctor spoke to him seeking to induce the daughter to return, he proposed to complete her education along particular lines, to make her the beneficiary of a certain life insurance policy he held, and a general heir of his estate, and also board and clothe her according to her station in life. It was shown that, after the respondent's return to his household, he did send her away to school for a year while she perfected herself in stenography and bookkeeping; that he supplied her with her board and clothing, and did have her named for a time as the beneficiary in a life insurance policy which he held in a beneficiary society. Whether he ever executed a will in her favor is not shown, but after his death it was found that his property was

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devised to his second wife, whom he had married not many months preceding his death, and that he had also made the wife the beneficiary of the insurance policy mentioned, thus cutting off the respondent entirely from participation in his estate.

The appellant contends that, for services rendered by a child to the parent, or by one to another who stands in the place of a parent, no recovery can be had unless the services were rendered on an express contract between them to the effect that the one performing the services should be compensated for them, and that, in this case, the evidence shows that the respondent was received into the family of Dr. Smith as his child and there is no sufficient proof of a contract on his part to pay for the services she rendered while occupying that relation. In *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352, we stated the rule governing in cases of this kind in the following language:

"It is a rule universally recognized that, when the services are rendered by one who is a member of the family of the employer, the law will not imply a contract to pay for the services from the mere fact that they have been rendered upon the one hand and benefits thereof received upon the other, as in the case of strangers. This is also held to be the rule when there is no actual blood relationship existing between the parties, provided they sustain to each other the ordinary relations of members of the same family. It has been held, however, that when the family relationship exists it is not necessary to prove the terms of a direct and positive contract, but that proof may be made of words, acts, and conduct of the parties, and circumstances from which the inference may follow that there was an understanding that the services were not to be rendered gratuitously; that when such is the case there is a contract upon which the value of the services can be recovered, and it is for the jury to say, from all the conduct of the parties and from the circumstances in evidence, whether there was in fact such an understanding or agreement."

See, also, *Hodge v. Hodge*, 47 Wash. 196, 91 Pac. 764; *McBride v. McGinley*, 31 Wash. 573, 72 Pac. 105.

Tested by this rule, and conceding that the burden was upon the respondent to establish the contract by a preponderance of the evidence, we think she made a case on which she was entitled to the judgment of the jury. Clearly there was evidence from which the jury could find that there was an understanding or agreement between Dr. Smith and the respondent that she should receive compensation for her services rendered after she returned to the doctor's household in 1898. The evidence leads, it is true, to the conclusion that the compensation was to be made in the will of the doctor, and from certain of his life insurance, but this does not bar the respondent from enforcing her claim. The rule is that where personal services are performed by one person for another under a contract or mutual understanding that compensation therefor is to be made in the will of the party receiving the benefit, or by some instrument to become absolute upon his death, and the party dies without making such provision, an action will lie against his estate to recover the reasonable value of the services. *Snowden v. Clemons*, 5 Colo. App. 251, 38 Pac. 475; *Miller v. Lash*, 85 N. C. 51, 39 Am. Rep. 678; *Riddle v. Backus*, 38 Iowa 81; *McGarvy v. Roods*, 73 Iowa 363, 35 N. W. 488; *Stewart v. Small*, 11 Ind. App. 100; *Bell v. Hewitt's Ex'rs.*, 24 Ind. 280; *Snyder v. Caster's Adm'r.*, 4 Yeates 353. So here, since the jury found in the respondent's favor on the question whether or not the services were gratuitous, she was entitled to recover on a *quantum meruit*; she need not predicate her action on a breach of the agreement.

The question whether there had been an accord and satisfaction of the respondent's claim between the respondent and Dr. Smith was properly left to the determination of the jury, and the verdict thereon is conclusive in this court.

The court allowed a recovery of interest from the time the appellant ceased working for Dr. Smith. This was error. The respondent's claim did not mature until Smith's death. At that time she had her election either to sue his estate on a

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quantum meruit or in damages for a breach of the agreement, and her right to interest would not accrue until she made her election. The election was made when she presented her claim to the administratrix for the reasonable value of the services, and interest should have been allowed only from that date. This does not, however, require a retrial of the action, as the amount to be allowed as interest is merely for mathematical computation. The record makes it clear that the jury returned a verdict for \$3,000, and interest at the legal rate from the date fixed by the court in its charge as the time from which interest could be computed. That date was February 25, 1903, but as the claim was presented to the administratrix on February 11, 1905, interest should have been allowed only from that time.

For the error last mentioned, the judgment is reversed, and remanded with instructions to enter a judgment in favor of the respondent for \$3,000, and interest from February 11, 1905, at 6 per cent per annum.

RUDKIN, ROOT, and CROW, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7355. Decided October 3, 1908.]

WILLIAM M. CHEATHAM, *Appellant*, v. FRANK P. HOGAN
et al., *Respondents*.¹

MASTER AND SERVANT—SAFE PLACE—DEFECTIVE SCAFFOLD—FELLOW SERVANTS. Where plaintiff, a common laborer, assisted carpenters in the construction of a scaffold, by passing material to them, without any voice in its selection or the manner of construction, and after it has served its purpose, the master directed the plaintiff to go upon the scaffold for the purpose of removing it, the master adopts and guarantees the same as a safe place to work, and is liable for an injury sustained by reason of negligent or improper construction; as the carpenters are not fellow servants as to the plaintiff.

¹Reported in 97 Pac. 499.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 26, 1907, upon granting a nonsuit, after a trial before the court and a jury, in an action for personal injuries sustained by an employee in the fall of a scaffold: Reversed.

Hand & Wright, Geo. A. Latimer, and Fred Miller, for appellant.

Belt & Powell and Graves, Kizer & Graves, for respondents.

FULLERTON, J.—The respondents, in 1906 and 1907, constructed a five-story brick building in the city of Spokane, on property owned by them. E. J. Cheatham was the general superintendent of the work, and directed the construction work generally. One Ridpath, a carpenter, was the carpenters' foreman, and laid out and directed the carpenter work. The appellant was a brother of the superintendent, and was employed about the building as a common laborer; it being his duty to do any sort of work he might be directed to do. The building was constructed with a light well near its center, approximately 15x45 in size, extending from the second floor to the roof. In the course of the construction of the building, it became necessary to construct a scaffold in the light well on which the workmen might stand while completing that part of the building. When this scaffold was first mentioned, Mr. Cheatham the superintendent suggested a swinging scaffold, but Hagan, one of the owners who was present, thought one built in the well would be better. The superintendent thereupon directed two carpenters to build it, telling them what kind of material to use and how to construct it, but giving them no further directions.

The carpenters built the scaffold as directed, the appellant assisting them in his capacity as a common laborer by passing boards to them as they were needed. He did not, however, have a voice either in the selection of the material or in the manner in which the scaffold was built. As built, the

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leger boards, or cross-pieces which supported the planking on which the workmen stood while performing their work, were nailed to posts which formed a part of the framework of the building, having no independent supports of their own.

Later on, owing to a change in the manner of finishing the light well, it was found necessary to detach these leger boards from the posts and support them by framework built up from the bottom of the well. Foreman Ridpath directed the change to be made. The carpenters ordered to reconstruct it selected from the material on hand such as they thought necessary for that purpose, and completed the change. Ridpath was around the work occasionally, but took no active part in it, nor did he select the material. The carpenters used for uprights boards 2x4 inches in size, and 16 feet in length; these they spliced together by nailing, and to these were nailed the leger boards which supported the planking on which the workmen using the scaffolding stood. The scaffold stood sometime after this, and was used by different sets of workmen engaged in completing the building. After it had fulfilled its purpose, the superintendent directed the appellant and others to take it down. The appellant got upon the scaffold for that purpose, when it fell, throwing him to the floor below and severely injuring him.

The falling of the scaffold was caused by the breaking of an upright near the floor on which it rested. The evidence tended to show that the upright which broke and caused the fall of the scaffold was defective, having a knot in it which reduced its strength. Also that the scaffold itself was defectively constructed in that a sufficient number of uprights were not used, and it was not properly braced so as to prevent its rocking and swaying when weight was put upon it and moved about. This action was brought by the appellant to recover for his injuries. On the foregoing facts appearing, he was nonsuited by the court, and judgment of dismissal and for costs entered against him. From the judgment he appeals.

The trial judge granted the nonsuit on the authority of the case of *Metsler v. McKenzie*, 34 Wash. 470, 76 Pac. 114. From the facts recited by the court in that case, it appears that the appellant was engaged with other carpenters in constructing a building, and that, in the course of the work, it became necessary to build a scaffold on which the carpenters could stand while nailing certain bridging to the rafters. The foreman came to the place where the appellant and other carpenters were at work, and gave them directions for their further work, directing a couple of them, without naming any one, to go and build a scaffold and finish nailing the bridging. One of the carpenters went away for that purpose and, together with another, erected the scaffold. In erecting it they unwittingly used a board which had been partially sawed into without discovering the saw cut. The appellant shortly after went to work on the scaffold and stepped onto the unsafe board, which broke under his weight and threw him to the floor below and injured him. The court held that he could not recover because the negligence causing his injury was the negligence of a fellow servant; that the master, since he had furnished the servants with necessary and suitable material to make their working place safe, did not owe to them the duty of inspecting it after they had completed it to see that it was sufficiently built.

But while this case decides the law correctly on the facts shown, we think it has no bearing on a case like the one at bar. The rule undoubtedly is that a master who retains no supervision over the erection of a scaffold, and gives no direction in regard to it further than to direct that it be constructed, and provides suitable materials for its construction and intrusts the duty to skillful workmen, is not liable to one of the workmen who is injured by the falling of the scaffold because of insufficient construction—this, on the principle that the master is not responsible to the workmen who construct the scaffold, nor to one who is engaged in a common

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employment with them in such a way as to be regarded as their fellow servant, for the sufficiency of their own work. But the rule has no application to a servant who did not construct the scaffold and who is not a fellow servant of the servant who did construct it. When one servant of a master constructs a scaffold for a particular purpose of the master, uses it for that purpose and then leaves it standing, and the master afterwards directs another servant, who had no part in its construction, to use it for another purpose, the master adopts the scaffold as his own, and thereby guarantees that it is a safe place on which to work. *Liedke v. Moran Brothers Co.*, 43 Wash. 428, 86 Pac. 646; *McBeath v. Rawle*, 93 Ill. App. 212; *McBeath v. Rawle*, 192 Ill. 626, 61 N. E. 847, 69 L. R. A. 697; *Stevens v. Howe*, 28 Neb. 547, 44 N. W. 865.

The facts of this case bring the appellant within the latter rule, rather than within the rule of the *Metzler* case. He had no part in the reconstruction of the scaffold, nor was it constructed by his fellow servants for his use. As to him, it was an independent structure, and when the master directed him to go to work upon it, he had the right to rely upon the assurance implied from the direction that it was a safe place in which to work.

We think the evidence offered by the appellant made a case for the jury, and that the court erred in granting a nonsuit. The judgment is reversed and remanded for a new trial.

RUDKIN, CROW, and DUNBAR, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7375. Decided October 3, 1908.]

HATTIE HILGAR, *Respondent*, v. THE CITY OF WALLA
WALLA, *Appellant*.¹

MASTER AND SERVANT—SAFE PLACE—EXCAVATIONS—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. It is a fair inference that a place was rendered unsafe by the negligence of the master where the evidence showed that, in excavating for a pipe line where the pipe forked, a tongue of earth was left, that the removal of the same was attempted under the direct supervision of a foreman, by undermining and pushing over sections, one of which fell on the deceased while working as instructed at a certain place, and that the sections were too long to be handled with safety unless braced.

SAME — CONTRIBUTORY NEGLIGENCE — ASSURANCE OF MASTER — OBVIOUS DANGERS. An employee is not guilty of contributory negligence in working in a ditch seven feet deep, undermining a section of earth, where it appears that he was called by the foreman from other work and instructed to assist in that particular work at a certain place; since he had a right to rely on the assurance of the master as to the safety of the place selected, unless the danger was so obvious that there could be no two opinions about it.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered March 4, 1908, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for the wrongful death of an employee. Affirmed.

Oscar Cain and *John C. Hurspool*, for appellant.

Garrecht & Dunphy, for respondent.

FULLERTON, J.—In January, 1907, the city of Walla Walla was engaged in putting in a pipe line for the purpose of conveying water from the source of supply down to the city. A large ditch had been dug in which to lay the pipe, which, at the place of the accident hereinafter mentioned, was some seven feet in depth. At that place, also, it was desired to put a fork in the pipe line, and to that end the

¹Reported in 97 Pac. 498.

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ditch had been forked, leaving a tongue of earth between the forks, which ranged in width from a few inches at the point of junction to four or five feet at a point some sixty feet therefrom. In laying the pipe, it was found necessary to remove this tongue of earth, and workmen under the direction of a foreman were placed at that duty. The method adopted was to cut it off into sections, undermine the section on one side, push it over, and throw the crumbled earth from the ditch. One such section, some ten feet in length, had been thrown down, and the workmen were engaged on the second section, when it fell, crushing and killing William H. Hilgar, the husband of the respondent, and the person for whose death she sues in this action.

The evidence concerning the surroundings, and the conditions immediately preceding and at the time of the accident, is conflicting. That most favorable to the respondent's contention, and which the jury must have believed in order to reach their verdict, tended to show that Hilgar was not a part of the crew who were originally put to work removing the earth, but that he was connected with the work of laying the pipe, and came to the ditch at the foreman's call after the first section had been thrown down, and after an unsuccessful effort had been made to throw the second; that he was instructed to take a pick and undermine at a particular place, and that while he was doing so the earth fell on him and crushed him. The evidence also tended to show that the section they were attempting to throw down was too long to be handled with safety unless braced or otherwise made secure while the process of undermining was being carried on, and that everything was done under the direct supervision of the appellant's foreman, who stood on the tongue just beyond the end of the section to be thrown down, and directed the workmen when and where to dig, and when to make an effort to push the section over. The jury returned a verdict in favor of the respondent, and from the judgment entered thereon this appeal is taken. On the appeal no question of law

is presented save that the evidence is insufficient to justify the verdict.

While counsel have filed able and exhaustive briefs, we do not feel that the case requires more than a brief discussion upon our part. We think that the questions, whether the death of Hilgar was caused by the negligence of the city, and whether he was guilty of contributory negligence in case negligence on the part of the city be found to exist, were questions to be determined by the jury. A master who puts his servant to work in a ditch or other excavation stands under an obligation, when he takes upon himself the direction and control of the work, to see that the place is reasonably safe when the servants enter it, and is kept reasonably safe as long as the servant is required to stay therein. It seems to us that it is a fair inference from the evidence that this was not done in the present instance; it is a fair inference that the place was rendered unsafe because too long a section was attempted to be thrown down at one time, and no precautions were taken to prevent accident in case of a mistake of judgment. These were questions at least on which the minds of men might reasonably differ, and being so, it is the province of the jury, and not the court, to draw the inference.

So, likewise, on the question of the injured person's contributory negligence. Since the master called him from other work to assist in this particular work, and assumed to direct and control his manner of doing the work, he was under no primary duty to inquire into the safety of the place where he was told to stand while working. He had the right to assume that the master had already inquired into the conditions, and would either direct him into a reasonably safe place, or warn him of the dangers of the place into which he was directed, so that he could either refuse to work there or take his own precautions for safety. The servant has the right to rely upon the assurance of the master, implied from the fact that he is directed to work in the particular place, that the place selected for him to work is reasonably safe.

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Statement of Case.

It is only when the danger is so plain and obvious that no two opinions can be had concerning it, that the servant assumes the risk of the conditions over the positive assurance of the master that it is a safe place. Whether the dangers of this place were thus plain and obvious was manifestly a question for the jury.

These are the only questions presented by the record, and we think the court did not err in submitting them to the determination of the jury.

The judgment is affirmed.

RUDKIN, CROW, and DUNBAR, JJ., concur.

[No. 6988. Decided October 3, 1908.]

JERRY MEEKER, *as Administrator, et al., Appellants*, v.
SIMON METTLER *et al., Respondents*.¹

GUARDIAN AND WARD—FINAL DISCHARGE—JURISDICTION—APPEARANCE OF WARD. Personal appearance of a ward who has attained his majority, upon the hearing of the final account of a guardian of a minor, is sufficient, without the appointment of a guardian *ad litem*, to give the court jurisdiction to order a discharge of the guardian, where the court had jurisdiction of the guardianship.

SAME—JUDGMENT DECLARING MAJORITY—EFFECT—CONCLUSIVENESS—PARTIES BOUND. The finding of a court having jurisdiction of the guardianship of a minor, that the ward has attained his majority is binding upon the ward and privies in estate until vacated or set aside for fraud or error; and is consequently a bar to an action by his heirs to set aside his subsequent conveyances on the ground that he was a minor (RUDKIN, J., dissenting).

Appeal from a judgment of the superior court for Pierce county, Miller, J., entered March 8, 1907, in favor of the defendants upon the pleadings, in an action to set aside deeds and recover lands. Affirmed.

Charles Bedford and *Fremont Campbell*, for appellants.

S. F. McAnally and *C. O. Bates*, for respondents.

¹Reported in 97 Pac. 507.

MOUNT, J.—This action was brought by the appellants to disaffirm certain deeds made by Peter Satiacum, deceased, in his lifetime, and to recover back from respondents the lands described in such deeds. After the issues were made up, the trial court entered a judgment in favor of the defendants upon the pleadings. Plaintiffs prosecute this appeal from that judgment.

The facts as shown by the pleadings are, in substance, as follows: Peter Satiacum during his lifetime was an Indian residing in Pierce county, this state. In the year 1895, while Peter Satiacum was a minor, one P. C. Kauffman was regularly appointed by the superior court of Pierce county and qualified as guardian of the person and estate of said minor. The guardian thus appointed acted as such until the year 1903, when on July 6 of that year the guardian filed his final account in the superior court of Pierce county, and prayed to be discharged for the reason that the minor had attained his majority. The final account thereafter came on for hearing in said court, and the ward being present the court, after hearing the final account, made the following order:

“This cause coming on regularly to be heard on the final report of P. C. Kauffman, guardian of said minor Peter Satiacum, said minor having arrived at the full legal age of twenty-one years and being entitled to have said guardian discharged and to have the control of his property;

“It further appearing to the court, by the report of the guardian filed therein, that he has received \$430.43 for his said ward and that he has expended for and in his behalf \$369.85, and that there now remains in his hands \$60.58, and that \$35 is a reasonable sum to be allowed as his compensation.

“It is hereby ordered that the said account of the said guardian be and the same is hereby approved. It is further ordered that the said guardian be and he is hereby authorized to retain \$35 of the money in his hands as his compensation, and that upon the payment of the balance then remaining in his hands to said Peter Satiacum and filing his receipt there-

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for in this court, the said P. C. Kauffman and his bondsmen be discharged from all further liability herein to the said Peter Satiacum.

"Dated this 6th day of July, 1903."

Thereafter, on the 5th day of August, 1903, the court made the following order, Mr. Kauffman and his ward being present:

"P. C. Kauffman, the guardian of the estate of the above named Peter Satiacum, having duly performed all the acts lawfully required of him and it having been decreed by the court that the said Peter Satiacum has arrived at the age of his majority, being over the age of twenty-one years, and the said P. C. Kauffman having duly accounted to said Peter Satiacum and paid over to him all the estate coming into his hands as such guardian,

"It is hereby ordered, adjudged and decreed that said P. C. Kauffman has fully and faithfully discharged the duties of his trust, that he is hereby fully and wholly discharged from all further duties as such guardian and that his letters of guardianship are hereby vacated, and that said guardian and his sureties are hereby released from all and any further liability by virtue of said trust."

Subsequently, on August 15, 1903, Peter Satiacum, representing himself to be of full age, and in consideration of \$800, sold, and by warranty deed conveyed, to defendants Simon Mettler and Annie Mettler, an undivided one-fifth interest in the lands in controversy. Thereafter, in consideration of \$525, Peter Satiacum sold to the same parties an undivided two-fifteenths interest in the same lands, in addition to the one-fifth theretofore sold. In the month of December, 1905, Peter Satiacum died. On May 16, 1906, these appellants, being collateral heirs to Peter Satiacum, brought this action to recover back the lands described in the deeds, alleging that at the time of the sale and delivery of the deeds the grantor was a minor. Plaintiffs tendered back the purchase money. The respondents Janzen and Eschback are subsequent purchasers from the Mettlers, but it is alleged

that they took title with the notice of the minority of the deceased at the time the deeds were made by him. The trial court held that the orders above quoted adjudged that Peter Satiacum at the date thereof was of lawful age, that said orders are *res adjudicata* as to these appellants, and that the verity of these orders cannot be attacked by general denials.

Appellants argue that the orders upon their face must show jurisdiction in the court, and that inasmuch as they do not state that Peter Satiacum was served with notice of the hearing, and no guardian *ad litem* was appointed or appeared for him, they fail to show jurisdiction in the court, and for that reason the orders are void. We cannot agree to that contention. The fact that a guardian was regularly appointed over the person and estate of the minor in the year 1895, which is admitted, necessarily gave the court general jurisdiction over the person of the minor and of his estate. This jurisdiction continued until the minor attained his majority, at which time the right to manage the estate and the person of the said minor by the court or the guardian ceased. Bal. Code, § 6401 (P. C. § 2735). If the ward had arrived at the age of majority when the final account of the guardian was filed, no guardian *ad litem* was necessary or proper. His personal appearance was sufficient to give the court jurisdiction, if personal jurisdiction were necessary. It is admitted, because alleged in the answer and not denied, that the ward appeared at the application for discharge and the hearing on the guardian's final report. It then appeared to the court upon the hearing that the ward had arrived at the age of majority. This fact clearly gave the court jurisdiction to enter the order of final discharge of the guardian, and cast the burden thereafter upon the ward to manage his own estate. The finding of the court that the ward had arrived at the age of majority was therefore not void, but voidable only, and was binding upon the ward and those in privity with him until vacated or set aside for fraud or for error.

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Woerner, Guardianship, § 98; *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154. In the case cited, we said:

"Upon attaining majority, and within the time limited either by the rules of common law or statute, such minors may attack any such judgment for fraud or error shown. In this state, statutory relief is afforded, as said sections 5153 and 5156 secure to appellants herein one year after coming of age, within which, by proper proceedings and upon proper showing and allegations, they may attack said judgment for fraud, or for error shown. *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099. Fraud sufficient to authorize such an attack must clearly appear from the allegations of the petition for vacation, showing not only that such fraud existed, but also that the court was influenced and deceived thereby, and induced to enter a judgment or decree prejudicial to the interests of said infants. Where it is sought to vacate a decree on the ground of error shown, said error must be prejudicial, must clearly appear upon the face of the record in the original proceedings, and must be such error as would have entitled the minor to a reversal of said decree or judgment upon appeal, had he been under no disability at the time of its entry, and in a position to prosecute such appeal. *Webster v. Page*, 54 Iowa 461, 6 N. W. 716."

There can be no doubt that the appellants in this case are privies claiming through Peter Satiacum, and have no greater rights than the minor would have were he now living. It is not claimed, either in the complaint or in the briefs, that the court was induced by fraud to make the finding that Peter Satiacum was of lawful age when he was not, or that the guardian did not act in entire good faith. No acts of fraud are alleged to avoid the orders. No error appears upon the face of the record in the original proceedings. If the court was right in finding that Peter Satiacum was of lawful age, then the conclusion necessarily followed. The evidence upon which that finding was made does not appear upon the record. It follows that, if this were a direct proceeding to review the original order for fraud or error, the ap-

pellants must fail under the rule stated in *Wilson v. Hubbard, supra*. It is unnecessary, therefore, to determine whether this is a direct or a collateral attack upon that order.

The principal question in this case is the same as in the final discharge of the guardian, viz., was Peter Satiacum of lawful age at the date thereof. That question was adjudicated by the orders quoted in the guardianship matter, by a court of competent jurisdiction, and must be conclusive upon these appellants until it is vacated, as pointed out in *Wilson v. Hubbard, supra*.

The judgment appealed from must therefore be affirmed.

FULLERTON and ROOT, JJ., concur.

DUNBAR, J., concurs in the result.

HADLEY, C. J., and CROW, J., took no part.

RUDKIN, J. (dissenting)—It seems to me that the doctrine of collateral attack upon which the majority opinion rests is wholly foreign to this case. The order discharging the guardian was neither more nor less than a judgment in a special statutory proceeding between the guardian and his ward. It will be readily conceded that that adjudication cannot be collaterally attacked in any subsequent action between the same parties or their privies. But the defendants in the present action were strangers to that proceeding. As to them it was *res inter alios acta*. Had the court found in the guardianship proceeding that the plaintiffs' ancestor was 15 years of age instead of 21, these defendants would not have been bound by that finding, and for that very reason the plaintiffs in the present action should not now be bound. The rule is thus stated in 23 Cyc. 1238:

"It is a rule that estoppels must be mutual; and therefore a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely no person can claim the benefit of a judgment as an estoppel on his adversary unless he

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would have been prejudiced by a contrary decision of the case."

This is but a statement of the elementary rule that estoppels must be mutual, and is supported by adjudications from all jurisdictions. It is one of the comparatively few questions upon which there is no division of opinion. In *Myers v. County of Johnson*, 14 Iowa 47, the court said:

"It is very apparent that if the case of *Whitaker v. The County of Johnson* had been decided in favor of the latter upon the issue suggested, that the county could not plead such decision in bar of the plaintiff's right to recover in this case, because such a defense would have the effect to conclude the rights of the plaintiff without giving him a day in court. *It is against the whole theory and policy of the law to deny to one party that which would be and must be allowed to his adversary, under like circumstances.*"

In *McDonald & Co. v. Gregory*, 41 Iowa 513, the same court said:

"It is manifest that the judgment, if in favor of defendants, could not have been pleaded as an estoppel against plaintiffs, and, for that reason, being against the defendants, it cannot be pleaded as an estoppel in favor of plaintiffs."

Discussing the same subject, Greenleaf says:

"But to prevent this rule from working injustice, it is held essential that its operation be *mutual*. Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either." 1 Greenleaf, Evidence (13th ed.), § 524.

Freeman says:

"No party is, as a general rule, bound in a subsequent proceeding by a judgment, unless the adverse party now seeking to secure the benefit of the former adjudication would have been prejudiced by it if it had been determined the other way. 'The operation of estoppels must be mutual. Both the litigants must be alike concluded; or the proceedings cannot be set up as conclusive upon either.' 'It is essential to an estop-

pel that it be mutual, so that the same parties or privies may both be bound and take advantage of it.' 'Nobody can take benefit by a verdict, that had not been prejudiced by it had it gone contrary.'” 1 Freeman, Judgments (4th ed.), § 159.

But, as stated above, the rule is elementary and universal and requires no discussion. The judgment should be reversed.

[No. 7107. Decided October 3, 1908.]

ESTHER JANE MORGAN, *Respondent*; v. NORTHERN PACIFIC
RAILWAY COMPANY *et al.*, *Appellants*.¹

ADVERSE POSSESSION—HOSTILE CHARACTER OF POSSESSION—EVIDENCE—SUFFICIENCY. The evidence is insufficient to establish title by adverse possession, but shows plaintiffs to have been mere squatters without claim of right or color of title, where it appears that the plaintiffs, husband and wife, at the time of trading off an interest in land in section 14 for a saloon, in 1883, were told by their vendee to go upon and build a house upon section 15, which was vacant railroad land; that they did so and made improvements and occupied the land until 1899, when ordered off by the railroad company, whereupon they applied for its purchase; that in view of their occupation and improvements, the company consented to sell the surface of the improved portion, reserving the coal deposit, and the plaintiffs, without making any claim to the land by reason of adverse possession, agreed to buy such portion for \$400, paying \$200 down and \$200 later when deed was delivered therefor, four years prior to the bringing of suit to quiet title to the entire tract, including the coal deposits.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 10, 1907, upon findings in favor of the plaintiff, after a trial before the court, in an action to quiet title. Reversed.

Carroll B. Graves and *Charles H. Farrell*, for appellants.

John W. Roberts and *Maurice D. Leehey*, for respondent.

¹Reported in 97 Pac. 510.

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Opinion Per MOUNT, J.

MOUNT, J.—This appeal is from a decree of the lower court declaring the plaintiff to be the lawful owner of certain lands, in King county, described as the northeast quarter of section 15, township 21 north, range 6 E., W. M., and decreeing that her title be quieted thereto, and enjoining and restraining all of the defendants, except the Pacific Coast Company, from entering upon said lands and from conducting mining operations thereon and from extracting coal or mineral therefrom.

The action was commenced in the superior court of King county, in December, 1904. The complaint alleged, that the plaintiff was, and had been at all times therein mentioned, the wife of one Timothy Morgan; that on May 7, 1904, the plaintiff and her husband were the owners in fee and lawfully seized of the described lands, and had resided continuously thereon since prior to July 14, 1886, and during all of said period held and occupied the same, together with all ores, coal, and other mineral beneath the same, actually, openly, exclusively, continuously, notoriously and adversely during all of said period, under claim of right and color of title, made in good faith; that on May 7, 1904, the said Timothy Morgan granted and conveyed to plaintiff, as her sole and separate property, all of his right, title, and interest in and to said lands, and that ever since said date the plaintiff and her family have continued to reside upon said lands, and she has continued in sole and exclusive possession of said land as the owner in fee thereof and as her sole and separate property, and that the defendants wrongfully and unjustly claim some estate or interest in and to said lands; and prayed judgment that her title might be quieted by the decree of court.

The defendant Joseph Krans, named in the complaint, was not served with process. The defendant Timothy Morgan, by answer verified on December 15, 1904, filed May 1, 1907, after the trial of the case, admitted all the allegations contained in the complaint, and consented that the judgment

might be rendered as prayed for. The defendant Farmers' Loan & Trust Company defaulted, and its default was duly noted.

The four defendants who are appellants here answered, and by denials traversed the material issues tendered by the complaint. The Northern Pacific Railway Company and the Northwestern Improvement Company further alleged, that the land in controversy was granted to the Northern Pacific Railroad Company under the Congressional act of 1864, which granted to said railroad company certain lands in aid of the construction of its railroad from Lake Superior to Puget Sound; that subsequently patent was issued to said railroad company, and that in the year 1895 said tract of land was conveyed to the Northern Pacific Railway Company; that in the year 1899, while plaintiff and defendant Timothy Morgan were husband and wife, they made certain claim to the tract of land, and that such claim was a mere squatter's right upon not to exceed twenty acres of land which they claimed to have jointly occupied; that this right was disputed by the Northern Pacific Railway Company; and that a settlement was agreed upon whereby the superior title of the railway company was recognized and acknowledged, upon the basis and consideration that the railway company sell and convey a certain portion of said lands, as set forth in a contract thereto attached and marked "Exhibit 1;" that said contract provides for the sale of the surface of the east half of said tract of land, reserving all coal or iron deposits to the railway company, and that the said Morgans were to pay \$400 therefor, \$200 at the date of contract and \$200 one year thereafter, said contract being dated the 25th of October, 1899.

The answer further alleged, that said written contract was executed by Timothy Morgan acting for himself and the plaintiff; that plaintiff was present at the time of the settlement and at the time of the contract, and expressly consented and agreed to the settlement and all the terms thereof; that

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the said Morgans have since occupied and used the surface of said land under and by virtue of said contract and sale thereunder; that, after the date of said contract, the Northern Pacific Railway Company sold the west half of said land, and the coal underlying the east half of the land, to the Northwestern Improvement Company, and the Northwestern Improvement Company thereafter leased the right to mine the coal to the Black Diamond Coal Mining Company, and thereafter the said Black Diamond Coal Mining Company assigned such lease to the Pacific Coast Company; that ever since the making of the contract with the Morgans, the Northern Pacific Railway Company, and its several successors in interest, have been in the possession of the coal underlying said land, and have ever since mined the same with the knowledge and consent of the plaintiff.

The Black Diamond Coal Mining Company and the Pacific Coast Company pleaded adverse possession by themselves and predecessors in interest for the statutory period. The reply denied all of the affirmative allegations contained in the answers of these four defendants. The cause was tried in October, 1906, and in May, 1907, the court made its findings, to the effect that the plaintiff was the owner in fee of the whole of the northeast quarter of section 15, township 21, north of range 6, E., W. M., by adverse possession and claim of right, and a decree was entered as above stated.

We have carefully considered all the evidence in the case, and the facts as they appear are, in substance, as follows: The Northern Pacific Railroad Company acquired the legal title to the land in dispute under United States grant of 1864. The map of definite location was filed in 1884. Patent was issued in 1894, and in 1896 the Northern Pacific Railroad Company conveyed title to the Northern Pacific Railway Company. In the year 1883, the plaintiff's husband, Timothy Morgan, was working for the Black Diamond Coal Mining Company, on section 14, directly east of section 15 above mentioned. At that time Timothy Morgan had filed a

homestead on a portion of section 14. In the year 1883, Timothy Morgan traded his interest in section 14 for a half interest in a saloon at Black Diamond.

One Ben Jones, superintendent of the Black Diamond Coal Company, told Mr. Morgan to move onto section 15, which was then vacant land, and that he, Jones, would give Morgan sixty dollars to help build a house on the land. Jones gave Morgan the sixty dollars, and Morgan built a house and moved his family on the northeast quarter of section 15, in July of 1883. He afterwards cleared and cultivated a portion of the land, and built other houses and a barn, and fenced the portions cleared. These improvements and nearly all of the clearing were done upon the east half of the quarter section.

In the year 1899, the railroad company discovered that Mr. Morgan and his family were occupying the land and improving the same, and thereupon notified them that they must vacate the land. In response to this notice, Mr. and Mrs. Morgan went to the office of Mr. Cooper, western land agent of the railroad company, in the city of Tacoma, and discussed the improvements they had placed upon the east eighty acres, and requested the right to purchase the whole quarter section. They were informed by Mr. Cooper that the land was coal land and was not for sale; but Mr. Cooper stated that he would recommend to his company the sale of the surface of the east eighty acres at \$5 per acre, in view of the residence, occupation, and improvements of the plaintiff upon the land; but would reserve the coal and iron. Mr. Cooper made this recommendation to his company, and received authority to sell the east eighty acres to the Morgans at \$5 per acre. This was satisfactory to the parties; and on October 25, 1899, Mrs. Morgan paid \$200 down and Mr. Morgan signed a written application for the purchase of the east eighty acres of land in question, without the coal and iron and right to mine same, and on the same day a written

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contract of sale was prepared in the office of Mr. Cooper and was signed by Mr. Morgan. A duplicate was made out, and a few days later was mailed from Mr. Cooper's office to Mr. Morgan at Black Diamond, and on November 10 Mrs. Morgan wrote and mailed to Mr. Cooper the following letter:

"Nov. 10th, '99.

Black Diamon, Wash.

"Mr. T. Cooper,

"Western Land Agent N. P. Ry. Co.

"Sir: Have read the one year contract you forwarded me, in regard to the land mention in said contract, and come to the conclusion not to sign it as I think it not necessary for me to do so. I will pay the balance due on the said land in six months or before if it is necessary.

"Please let me know by mail when will you can grant me a deed for the said 80 acres or for the 160 acres, as mention before at your office.

"Respect yours,

"Timothy Morgan,

"Black Diamond, Wash."

Thereafter, on October 23, 1900, Mr. and Mrs. Morgan paid the balance due on the contract, and on the next day a deed was executed by the railway company for the east half of the northeast quarter of section 15, township 21 north, range 6 E., W. M., to Timothy Morgan, but reserving the coal and iron and the right to mine the same. Subsequently, in the year 1904 and just prior to this suit, Timothy Morgan deeded all his right to the northeast quarter of section 15 to his wife, who thereupon brought this action.

There is a dispute in the evidence as to what occurred in Mr. Cooper's office on October 25, when the plaintiff and her husband entered into the contract to purchase the northeast eighty acres of section 15. The plaintiff and her husband testified that they claimed the whole quarter by reason of adverse possession, and purchased only to avoid a lawsuit, and that she refused to let her husband sign the contract because of the reservation of coal and iron; while, on the other hand, Mr. Cooper testified, and was corroborated, to

the effect that no such claim was made; that both plaintiff and her husband recognized the right of the railway company, and requested only the right to purchase by reason of the improvements and long-continued residence thereon, and that they made no objection to signing the contract until the letter above quoted was received. It was known at that time, and long prior thereto, that the lands were coal lands and chiefly valuable as such. In the letter which was written by Mrs. Morgan at the time of the negotiations, no claim is made that she or her husband had any interest in the land by reason of adverse possession. Her reason for her husband not signing the duplicate was stated as because "I think it not necessary for me to do so. I will pay the balance due on the land in six months, or before if it is necessary." It was afterwards paid. We think this conclusively shows that the prior occupation of the land was not with the intent of claiming it adversely to the true owner, but that the plaintiff and her husband were mere squatters upon it, without claim of right or color of title. Such possession is not sufficient to base a title of adverse possession upon. *Lohse v. Burch*, 42 Wash. 156, 84 Pac. 722; *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330.

It is true, Mr. Morgan testified that, at the time he traded his land in section 14 for a half interest in the saloon in Black Diamond, Mr. Jones, the superintendent of the Black Diamond Coal Mining Company, told him to go upon section 15, and furnished him \$60 toward building a house; and also that Mr. Jones told him the Black Diamond Coal Company was going to give him this piece of land. But the evidence was apparently so confused upon this point that we give it no weight. The deed from Mr. Morgan to his wife conveyed to her no greater interest in the land than both together had. It was an apparent effort to escape the consequences of Mr. Morgan alone signing the application or contract to purchase in the year 1899. The plaintiff and her husband were together at that time, and acted together dur-

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ing the whole transaction at which the eighty acres were sold to them by the railway company. In fact, Mrs. Morgan herself paid the money and wrote the letter above set out, and was equally bound with her husband, even if she did not actually sign the contract. We are convinced that the bringing of this action was an afterthought, and that neither the plaintiff nor her husband had any thought of claiming or holding any part of the property from the railroad company until long after they had purchased the east eighty acres. Substantially all the improvements made by them are shown to have been on the part they purchased. They, of course, have clear title to the eighty acres improved and purchased by them, subject to the reservation of coal and iron, but they have no legal claim to the west eighty acres of the northeast quarter of said section 15.

The judgment of the lower court is therefore reversed, and the cause ordered dismissed.

HADLEY, C. J., CROW, RUDKIN, and ROOT, JJ., concur.

[No. 7314. Decided October 3, 1908.]

LILLY-BRACKETT COMPANY, *Respondent*, v. AMADAUS H. SONNEMANN, *Appellant*.¹

CORPORATIONS—ACTIONS—BY FOREIGN CORPORATION—LICENSE FEES—DOING BUSINESS. Bal. Code, § 5149, providing that no corporation shall commence any action in this state without alleging and proving that it has paid its annual license fee, refers only to corporations doing business in this state, and does not apply to a nonresident corporation simply bringing an action in this state, as that does not constitute doing business here.

JUDGMENTS—ACTIONS ON—LIMITATIONS—DURATION OF LIEN—STATUTES—CONSTRUCTION. Bal. Code, § 5149, providing that no suit or proceeding shall ever be had on any judgment rendered in this state by which the lien or duration thereof shall be extended or continued in force for any greater period than six years from its date, does not prohibit actions on domestic judgments, which under Bal Code, § 4798, may be commenced within six years.

¹Reported in 97 Pac. 505.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 17, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action upon a judgment. Affirmed.

O. C. Moore, for appellant.

Post, Avery & Higgins, for respondent.

MOUNT, J.—This action was brought by the respondent to recover against the appellant upon a judgment, alleged to have been entered in favor of the respondent and against appellant, in the state of Massachusetts, upon personal service and personal appearance by the appellant in that state. Appellant interposed a general demurrer to the complaint. This demurrer was overruled, and appellant then answered, denying generally the allegations of the complaint upon information and belief. Thereafter the cause came on for trial to the court without a jury. Appellant objected to the introduction of any evidence, upon the ground that the complaint failed to state a cause of action. This objection was overruled, and a certified copy of the judgment roll of the Massachusetts court was received in evidence. Appellant offered no evidence. Thereupon findings and a judgment were entered against appellant as prayed for in the complaint. Defendant appeals, and relies upon two points: (1) that there is no allegation or proof that the respondent corporation had paid its annual license fee; (2) that since there is no allegation or proof respecting the force and effect of the judgment rendered in Massachusetts, it is not actionable in this state, under the provisions of Bal. Code, § 5149 (P. C. § 283).

The first point is based upon the statute of 1907, which provides that, "No corporation shall be permitted to commence or maintain any suit, action, or proceeding in any court of this state without alleging and proving that it has paid its annual license fee last due." Laws 1907, p. 271. It

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nowhere appears that the respondent corporation is doing business in this state, or that its articles of incorporation are on file in the office of the secretary of state, or that it is required to pay an annual license fee. The mere bringing of an action in this state does not constitute doing business in the state, so as to require a foreign corporation to pay an annual license fee. *Marble Savings Bank v. Williams*, 23 Wash. 766, 63 Pac. 511. The provision above quoted refers only to corporations "doing business in this state," as shown by the title of the act. It was therefore not necessary to allege or prove the payment of an annual license fee.

The position of appellant upon the second point is stated in his brief as follows:

"No suit or action could be maintained on a Washington judgment of the date of the one on which the present action is based. No evidence having been introduced or offered to show that a suit could have been maintained in Massachusetts on the judgment on which it is sought to prosecute the present action, the presumption arises that the laws of that state touching such matters are identical with those of Washington, and hence no action could be maintained on said judgment in the state of Massachusetts."

The judgment sued upon was rendered on January 1, 1906. The appellant claims, if we understand him correctly, that no action can be maintained in this state upon a domestic judgment, because of Bal. Code, § 5149, which provides as follows:

"No suit, action, or other proceedings shall ever be had on any judgment rendered in the state of Washington by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment."

This section does not prohibit actions on domestic judgments. It means what it says, viz., that the lien shall not be extended longer than six years. There is no prohibition against an action upon a judgment or to establish the lien.

Section 4798 (P. C. § 281), provides, "that an action upon a judgment or decree of any court in any state may be commenced within six years." It was held in *Citizens Nat. Bank v. Lucas*, 26 Wash. 417, 67 Pac. 252, 90 Am. St. 748, 56 L. R. A. 812, that this section applies to domestic judgments. See, also, *Shephard v. Gove*, 26 Wash. 452, 67 Pac. 256; *Meek v. White*, 26 Wash. 491, 67 Pac. 256; *Cathcart v. Bryant*, 28 Wash. 31, 68 Pac. 171. If appellant's contention is correct, that it will be presumed that the laws of Massachusetts are the same as the laws of this state, it follows that the action may be maintained in Massachusetts because it may be maintained in this state.

The judgment was right, and must therefore be affirmed.

HADLEY, C. J., CROW, and DUNBAR, JJ., concur.

[No. 7242. Decided October 3, 1908.]

CARL CARLSON, *Respondent*, v. WEYERHAEUSER TIMBER COMPANY, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—DEFECTIVE MACHINERY—USE OF OTHER SAFE AGENCIES. The working place provided for an edgerman in a mill is not rendered unsafe by the mere fact that live skids used to convey the lumber from the live rolls to the edger had become worn and too low, so that obstructions were liable to occur on the live rolls near the plaintiff's working place, where the live skids were merely a labor saving device for the conveyance of the lumber and the master had stationed employees whose duty it was to look after obstructions when the skids failed to perform their functions; since the live skids, even if too low, were not inherently dangerous, and their use not negligence so long as other safe agencies were employed; the proximate cause of the injury being the negligence of a fellow servant and not the defective condition of the skids.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered August 12, 1907, upon the verdict of a jury rendered in favor of the plaintiff, after a

¹Reported in 97 Pac. 501.

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trial on the merits, in an action for injuries sustained by an employee in a mill. Reversed.

Cooley & Horan, for appellant.

F. E. Anderson and Coleman & Fogarty, for respondent.

RUDKIN, J.—The defendant owns and operates a sawmill, at the city of Everett, in this state, in which the plaintiff was employed as edgerman at the time of receiving the injuries complained of in this action. A system of live rolls was installed and maintained in the mill for the purpose of conveying the sawed material from the main saw to the opposite end of the mill. The edger at which the plaintiff was employed was situated about 80 or 100 feet back from the main saw, and about 10 feet to the right of the live rolls. Lumber was diverted from the live rolls to the edger deck in the following manner: An appliance known as a bumper, raised by means of a lever, would arrest the forward movement of the lumber along the live rolls; the weight of the lumber pressing down on a sheet-iron cover would cause a system of live skids to rise automatically; and live chains operating over the skids through grooves would then convey the lumber from the live rolls to the edger deck.

While the plaintiff was employed about the edger on the morning of August 17, 1905, a plank two inches thick, twelve inches wide, and about forty feet long was sent down over the live rolls by the offbearer. The bumper was raised for the purpose of diverting the plank from the live rolls to the edger deck. The end of the plank next to the edgerman was carried over by the live skids, but the opposite end caught or dragged on the covering between the live rolls. While the plank was in this position, a heavy piece of timber sent down by the offbearer struck it and drove it against the plaintiff's leg, causing the injuries here complained of. The following is the allegation of negligence set forth in the complaint:

"That at the time aforesaid the defendant operated, as a part of its said mill, live rollers to carry the lumber sawed

away from the head saw in said mill; that in connection with said live rollers the defendant operated skids, on which said skids were live chains; that said skids and live chains were at said time, and for a long time prior thereto, designed and used to divert from the live rollers and carry to the edger deck all lumber to be run through said edger machine, and on said date the defendant negligently permitted said skids, live chains and other machinery to be and remain in a defective, unsafe and dangerous condition, in that said skids were too short and were situated too low with reference to said live rollers and said edger deck and the cover hereinafter mentioned, and were so worn and loose at the joints that when said skids were operated for the purpose of diverting the lumber from said live rollers to said edger deck, as aforesaid, said skids failed to cause the lumber so to be diverted, to leave the said live rollers and the cover of the gearing adjoining said live rollers and situated between the said live rollers and the said edger deck, but permitted the lumber, so to be diverted as aforesaid, to lie and remain in dangerous proximity to said live rollers."

The answer denied the negligence charged in the complaint, and alleged contributory negligence, negligence of a fellow servant, and assumption of risk. The plaintiff had judgment below, and the defendant appeals.

Error in denying a motion for nonsuit and a motion for judgment at the close of all the testimony is the principal assignment upon which the appellant relies for a reversal. The testimony shows that the live skids to which we have referred were hinged on a shaft where they connected with the dead skids. Babbitting was placed around the shaft at these points for the purpose of taking the wear occasioned by the turning of the shaft. This babbitting would gradually wear away through the operation of the mill, and as it wore away, the live skids would naturally drop below the dead skids, to the extent of the wear. At the time of the accident complained of, there was testimony tending to show that the two center skids (there being four in all), were almost an inch lower than the dead skids with which they were con-

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nected, although the testimony on the part of the appellant tended to show that the babbitting was only five-eighths of an inch thick in the first instance and that the drop in the skids could not exceed one-half inch. The testimony further tended to show that this condition had existed for about a month prior to the injury to the respondent; that by reason thereof the live skids had failed to convey the lumber to the edger deck as effectually as they had prior to that time; that up to about a month prior to the accident the live skids had never failed to convey lumber from the live rolls to the edger deck, unless the lumber caught on a piece of bark, a knot, or some other obstruction, so as to prevent the live skids from taking hold, and that there was no such obstruction under the plank which caused the injury to the respondent.

If the bare fact that the live skids were too low, and that this particular accident would not have happened had the skids been properly adjusted, is sufficient to fix liability upon the appellant, we are not prepared to say that the verdict is unsupported by the testimony, but even this is problematic. The appellant contends, however, that the live skids in question were merely a labor saving device; that an employee was placed in charge of the live rolls, whose duty it was to see that one piece of lumber was not run down upon another; that it had stationed another employee at the slasher saw, about forty feet back from the edger, provided with a picaroon, whose duty it was to pull the lumber from the live rolls when, for any reason, the live skids failed to perform their functions, and that these different agencies rendered the working place of the respondent perfectly safe, so long as the offbearer and slash sawyer performed the duties assigned them.

This contention must be sustained. Conceding that the live skids were too low and out of repair, they were not inherently dangerous. The only effect that could result from their condition was that they might fail to convey the lumber from the live rolls. But so long as the appellant had

made provision for such a contingency, and had placed a man in charge of the live skids and slasher saw to aid these mechanical devices in removing lumber from the live rolls, it made the working place safe. In *Bajus v. Syracuse etc. R. Co.*, 103 N. Y. 312, 8 N. E. 529, 57 Am. Rep. 723, it was contended that the accident was caused through the lessening of the power of a steam engine by a defect in the throttle valve. In answer to this contention, the court said:

"The defect in the throttle-valve, therefore, had no relation whatever to this accident, and the plaintiff's sole reliance for the maintenance of his action must be upon the defective condition of the flues and of the main steam valve, the sole consequence of which was the diminished power of the engine. These defects may have diminished the power of the engine by several horse-power, so that the engine, instead of being, for instance, eighty horse-power, was only seventy. It matters not that this diminished power came from these defects, nor how the engine came to be of only seventy horse-power. The responsibility for the defects is no greater than it would have been if the defendant had furnished a new engine of precisely the same power."

And so here, if the appellant had supplied a mechanical device to transfer one end of the lumber to the edger deck and had stationed an employee at the other end to accomplish the same result by manual labor, it could not be said that it failed in any duty it owed to the respondent, provided, the two agencies furnished were sufficient to accomplish the object in view. The mere use of a defective appliance not in itself dangerous is not negligence so long as other safe agencies are employed to supply its deficiencies. Nor was the negligence which caused the injury in this case the joint or combined negligence of the appellant and a fellow servant of the respondent. If the agencies supplied by the appellant for transferring lumber from the live rolls to the edger deck were reasonably safe and sufficient for that purpose, and an accident resulted through the failure of a fellow servant to perform the duty assigned him, the negligence of the fellow

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Citations of Counsel.

servant and not the defective condition of the skids was the proximate cause of the injury. *Pease v. Chicago etc. R. Co.*, 61 Wis. 163, 20 N. W. 908; *Sullivan v. Wamsutta Mills*, 155 Mass. 200, 29 N. E. 516; *Norfolk etc. R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Williams v. Central R. Co.*, 43 Iowa 396; Cooley, Torts (2d ed.), 78.

We are therefore of opinion that the working place provided by the appellant was reasonably safe, as a matter of law, and that the respondent was not injured by reason of any negligence charged in the complaint.

The judgment is reversed, with directions to dismiss the action.

HADLEY, C. J., CROW, and MOUNT, JJ., concur.

[No. 7345. Decided October 3, 1908.]

W. S. MCCREA *et al.*, Respondents, v. WALTER OGDEN *et al.*,
Appellants.¹

FRAUDS, STATUTE OF—SALE OF REAL ESTATE—MEMORANDUM—SUFFICIENCY—CONTRACT FOR COMMISSIONS—BROKERS. The words "commission to be paid when 2d payment is made to M. & M., \$625," after the signature of the vendor at the foot of a contract to purchase real estate, constitute a substantial compliance with Laws 1905, p. 110, providing that an agreement for a broker's commission on the sale of real estate shall be void unless the contract or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized (RUDKIN, FULLERTON, and CROW, JJ., dissenting).

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 25, 1908, in favor of the plaintiffs, upon overruling a demurrer to the complaint, in an action on contract. Affirmed.

Post, Avery & Higgins, for appellants, cited: 20 Cyc. 274; 29 Am. & Eng. Ency. Law (2d ed.), pp. 848, 849, 864; 9 Cyc. 717; Bliss, Code Pleadings, § 268; Browne, Statute

¹Reported in 97 Pac. 503.

of frauds (5th ed.), §§ 357, 372, 387, 395; *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473; *Zimmerman v. Zehendner*, 164 Ind. 466, 73 N. E. 920; *Palmer v. Marquette*, 32 Mich. 274; *Ridgway v. Ingram*, 50 Ind. 145, 19 Am. Rep. 706; *American Iron & Steel Mfg. Co. v. Midland Steel Co.*, 101 Fed. 200; *Wilstach v. Heyd*, 122 Ind. 574, 23 N. E. 963; *Boardman v. Spooner*, 13 Allen 353, 90 Am. Dec. 196; *Hall v. Soule*, 11 Mich. 494. Independent of the statute of frauds, the complaint does not state any sufficient consideration to show a legal contract. 6 Am. & Eng. Ency. Law (2d ed.), p. 679; 9 Cyc. 717-718; Bliss, Code Pleadings, § 268; Browne, Statute of Frauds (5th ed.), § 387.

Danson & Williams, for respondents. The contract was sufficiently signed. *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055, and cases cited; Clark, Contracts, p. 125; *Coddington v. Goddard*, 16 Gray 436; Browne, Statute of Frauds (5th ed.), § 357. The memorandum was sufficient. *Isphording v. Wolfe*, 36 Ind. App. 250, 75 N. E. 598; *Woolsey v. Jones*, 84 Ala. 88, 4 South. 190; *Rogers v. Duff*, 97 Cal. 66, 31 Pac. 836.

Root, J.—This was an action to recover a commission for the sale of real estate. Defendants demurred to plaintiffs' complaint, and upon their demurrer being overruled, elected to stand thereupon, whereupon a judgment in favor of plaintiffs was entered, from which this appeal is prosecuted by defendants.

Paragraphs 1 and 2 of the complaint alleged the plaintiffs to be copartners, engaged in the commission brokerage real estate business, at Spokane, and that defendants were husband and wife. Paragraph 3 alleged that the defendants, on the 3d day of September, 1907, entered into a contract to sell certain real estate to one James B. Conroy, the contract being set forth in full. At the end of the contract and following the signatures of the defendants thereto, were these words: "Commission to be paid when 2nd payment is made

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to McCrea & Merryweather \$625.00." Paragraphs 4 and 5 were as follows:

"(4) That said agreement to pay to plaintiffs said commission of \$625 was for services which plaintiffs had theretofore performed in producing said James B. Conroy as a purchaser and inducing him to enter into said written agreement to purchase said real estate and for such services as plaintiffs should thereafter render in inducing said Conroy to pay said sum of \$7,000, and to enter into a written contract to purchase said property for said sum of \$20,000, and thereafter and on the 3rd day of October, 1907, said Conroy did enter into a written agreement with defendants whereby defendants agreed to sell said real estate to said Conroy and said Conroy agreed to purchase the same for the sum of \$20,000, and then and there did pay to said defendants said sum of \$6,500, and agreed to pay the balance as specified in said written agreement which was filed for record in the county auditor's office of Spokane county, Washington, on the 31st day of October, 1907, and recorded in Volume G of Contracts at page 530.

"(5) That plaintiffs have fully performed said agreement and said purchaser was produced and said sale brought about and completed by reason of the services performed by said plaintiffs."

Paragraph 6 alleged demand and refusal of payment.

Appellants contend that the transaction is within the statute of frauds governing contracts to pay for services for buying or selling real estate, as set forth in the Laws of 1905, page 110; that the words at the end of the contract do not constitute a compliance with the statute mentioned. We think they do constitute a substantial compliance. These words show the fact that a commission was to be paid, when it was to be paid, to whom it was to be paid, and the amount that was to be paid. But it is urged by appellants that it does not state who was to pay this commission. With the contract before him, we cannot see how it would not be clear to any one that the intention was that the signers of the contract, the vendors, should pay this commission. It is true

that a purchaser sometimes pays a commission, but this is the exception and not the rule. When we speak about a real estate sale and a commission being paid, we ordinarily understand, unless there is specific mention to the contrary, that it is the vendor who pays the commission. This contract was signed by the vendors only, and we think there could be no possible mistake or misunderstanding as to who was to pay the commission that is provided for in this memorandum.

It is urged that the language used is not sufficient, in that it does not express all the terms of the employment of the agents or brokers. The statute in question does not require the agreement to be in writing. It says that such an agreement shall be void unless it, or some note or memorandum thereof, be in writing. Hence, the agreement may be in writing, or there may be merely a note in writing or a memorandum in writing. The purpose of this statute was to prevent the vendors and purchasers of property from being defrauded after a sale had been made, by brokers or agents wrongfully claiming to have been authorized to make sales or purchases. The statute should be construed and enforced so as to prevent such frauds; but it should not be construed or enforced in a manner that will defraud the broker. In this case it is perfectly clear that these vendors agreed to pay the brokers \$625. To give the statute a construction that would nullify this clear intention and defraud these brokers of the commission which they honestly earned, would be to make the statute an instrument of oppression, which the legislature never intended. The facts in this case clearly distinguish it from the case of *Keith v. Smith*, 46 Wash. 191, 89 Pac. 473, and the case of *Foote v. Robbins*, ante p. 277, 97 Pac. 103.

We think the complaint stated a cause of action. The judgment of the superior court is affirmed.

HADLEY, C. J., MOUNT, and DUNBAR, JJ., concur.

RUDKIN, J. (dissenting).—Section 1 of the act of March 3, 1905, Laws 1905, p. 110, provides that in the following cases

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"any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: . . . (5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission." It seems to me the following note or memorandum appended to a written contract between the vendor and the purchaser after the signature of the vendor, "*Commission to be paid when 2nd payment is made to McCrea & Merryweather \$625.00,*" falls far short of a compliance with the above statute. It neither authorizes nor employs the respondents to sell or purchase real estate, nor is it a note or memorandum of any contract or agreement with them. I therefore dissent.

FULLERTON and CROW, JJ., concur with RUDKIN, J.

[No. 7430. Decided October 6, 1908.]

F. T. CROWE & COMPANY, *Appellant*, v. PETER BRANDT *et al.*,
Respondents.¹

APPEAL—REVIEW—EXCEPTIONS. One general exception to the refusal of proposed findings of fact and conclusions of law is insufficient to secure a review of the findings made.

APPEAL—RECORD—STATEMENT OF FACTS. Where no error is predicated upon the exclusion of evidence, and there are no exceptions to the findings of fact, the statement of facts will be struck out, and the judgment affirmed if the findings sustain the judgment.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 17, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

¹Reported in 97 Pac. 503.

John E. Ryan, for appellant.

Blaine, Tucker & Hyland, for respondents.

PER CURIAM.—This was an action to foreclose a material-man's lien. The court made findings of fact and conclusions of law, and entered its decree in accordance therewith. The appellant proposed certain findings and conclusions, which were rejected. The respondents have interposed a motion to strike the statement of facts, and to affirm the judgment, for the reason that no proper exceptions were taken to the findings of fact and conclusions of law. No exceptions whatever were taken to the findings as made by the court, and the only exception to the refusal to find as requested is contained in the following entry in the minutes of the clerk: "Plaintiff's proposed findings and conclusions are presented and refused, exception allowed." Under the uniform rulings of this court, a general exception of this kind is of no avail. *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815; *Horrell v. California etc. Ass'n.*, 40 Wash. 531, 82 Pac. 889, and cases cited. Inasmuch as no error is predicated upon the exclusion of testimony, the motion to strike the statement of facts must be granted.

The findings of the court sustain its judgment, and in the absence of a statement of facts or bill of exceptions, there is no question before us for review. The judgment is therefore affirmed.

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[No. 7423. Decided October 6, 1908.]

*ANNA CANEDY, Appellant, v. FRANK M. SKINNER et al.,
Respondents, MORAN & COMPANY et al., Defendants.*¹

FRAUDULENT CONVEYANCES—HUSBAND TO WIFE—PRESUMPTIONS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a finding that a conveyance from a husband to a wife was fraudulent as to creditors, in view of Bal. Code, § 4580, raising such presumption and casting the burden on the wife to overcome the same by clear and satisfactory proof, where her testimony to the effect that the property was conveyed to her for the expressed consideration of \$5,000 in payment of a note of \$800 for money loaned by her to him, which money had been loaned to her sister before marriage, was contradicted by evidence tending to show admissions that she had given her money to another and lost it, and neither her sister or husband were called to testify.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered November 25, 1907, upon findings in favor of the defendants, after a trial before the court without a jury, in an action to set aside an execution sale. Affirmed.

Hulbert & Husted, for appellant.

Merrick & Mills, for respondents.

RUDKIN, J.—The plaintiff, Anna Canedy, and the defendant S. S. Canedy intermarried in Snohomish county, on the 11th day of September, 1903, and are now husband and wife. At the time of the marriage, the husband was the owner of the quarter section of land now in controversy, together with a shingle mill and certain other real property. On the 25th day of February, 1905, the husband conveyed this quarter section and the other property to the wife by warranty deed, the deed reciting a consideration of \$5,000. On the 15th day of June, 1905, the defendant Moran & Company, a corporation, recovered judgment against the husband in the superior

¹Reported in 97 Pac. 497.

court of Snohomish county, in the sum of \$410.55. On the 24th day of July, 1905, the defendant Bruhn & Henry, Incorporated, recovered judgment against the same defendant in the same court, for the sum of \$265. On the 25th day of July, 1905, the Merchants Protective Association recovered judgment against the same defendant in the same court for the sum of \$537.54. The property in controversy was thereafter sold under execution on the two first-mentioned judgments, by the sheriff of Snohomish county, and the assignee of the last-mentioned judgment has redeemed from the sales so made.

This action was instituted by the wife against the husband, the judgment creditors, and the sheriff, to cancel and annul the sheriff's sales and remove the cloud from the plaintiff's title. From a judgment in favor of defendants, the plaintiff has appealed.

Briefly stated, the contention of the appellant is that she loaned her husband the sum of \$800, on the 1st day of November, 1904, taking his promissory note therefor, and that thereafter, by agreement between her husband and herself, the property now in controversy was conveyed to her in payment and satisfaction of the loan so made. In support of this claim, the appellant testified that, some time prior to her marriage, she loaned the sum of \$800 to her sister; that this loan was repaid after her marriage, the principal and interest amounting to the sum of \$870; that this money was placed in a drawer in her husband's safe, and remained there for about a month; that she loaned \$800 of this sum to her husband, taking his promissory note therefor; that soon thereafter the husband became involved and could not repay her; that she requested him to convey this property to her in payment of the loan; that he demurred at first, but later executed a deed in her favor for this and other property, the deed reciting a consideration of \$5,000; that she told her husband that this was not according to their agreement, but

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he replied that it would be all right; that thereafter she conveyed the property included in this deed, other than the property in controversy, to a third person, at her husband's request. The witness produced the \$800 note at the trial, with the signature torn off, and offered bank statements tending to show that she had about this amount on deposit some time prior to the alleged loan to her sister. She was corroborated by another witness as to the loan to the husband and the execution of the note.

The respondents, on the other hand, offered testimony tending to show admissions on the part of the appellant to the effect that she had given her money to a barkeeper to buy a saloon, and that it was lost to her, and other admissions tending to show that she was without means. The sister to whom the loan was made was not called as a witness, nor was her deposition taken; and the husband did not testify, though apparently within reach of the process of the court.

Under our statute, the conveyance from the husband to the wife was presumptively fraudulent as against creditors [Bal. Code, § 4580 (P. C. § 3864)], and the burden was on the appellant to overcome this presumption by clear and satisfactory proof. *Liebenthal v. Price*, 8 Wash. 206, 35 Pac. 1078; *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961. The appellant testified to facts tending to overcome this presumption, and was not contradicted by any direct testimony; but the court below, with its superior advantages and opportunities, has decided against the *bona fides* of her claim, and there is nothing in the record to convince us that its conclusion was erroneous.

The judgment is therefore affirmed.

HADLEY, C. J., DUNBAR, and CROW, JJ., concur.

[No. 7255. Decided October 6, 1908.]

J. H. YOUNG, *Appellant*, v. EDWARD DAVIS *et al.*,
Respondents.¹

MORTGAGES—FORECLOSURE—JUDGMENT — LIEN — VENDOR AND PURCHASER—CONSTRUCTIVE NOTICE OF SALE. A judgment of the superior court being a lien upon real property of the judgment debtor in the county, from the date of its entry under Laws 1893, p. 65, a judgment of foreclosure of a mortgage is constructive notice of the sale and proceedings thereunder, without the filing of any notice of *lis pendens* or certificate of sale in the recorder's office; and subsequent purchasers from the mortgagor take an inferior title regardless of the fact of their taking possession and making improvements in good faith.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered October 16, 1907, upon findings in favor of the defendants, after a trial before the court without a jury, in an action to quiet title. Affirmed.

S. Douglas, for appellant.

W. H. Jackson, for respondents.

FULLERTON, J.—The appellant, who was plaintiff below, began this action to quiet title in himself to certain real property situated in Colville, Stevens county, Washington. The respondents answered claiming title in themselves, which title they also asked to be quieted. On the issues made, a trial was had before the court, which resulted in findings and a judgment in favor of the respondents. This appeal was taken therefrom.

The facts shown by the record, material to the inquiry here, are in brief these: On March 31, 1890, one W. H. Kearney, a bachelor, was the owner of the land in dispute, and on that day mortgaged the same to the Stevens County Bank, to secure the payment of a promissory note of \$500 and interest, due ninety days after date. This mortgage was

¹Reported in 97 Pac. 506.

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duly recorded in the auditor's office of Stevens county. Thereafter the bank became insolvent, and on September 12, 1902, made a general deed of assignment of all its property, including the mortgage and note above mentioned, to one John B. Slater. Slater entered upon the duties of his trust, and shortly thereafter began proceedings to foreclose the mortgage. Thereafter, and while the suit was pending, Slater resigned his trust, and one William J. Galbraith was appointed receiver in his stead. Galbraith continued the foreclosure proceedings, obtaining a decree and order of sale in the regular way on September 12, 1894, under which the property was sold to one Frank Fish on May 22, 1896. At the time of the sale, a certificate of sale in due form was made out by the officer conducting the sale, and delivered to Fish; also, due return of the sale was made and filed in court, and the sale confirmed June 5, 1896. No notice of the pendency of the action was filed with the auditor, either by Slater or Galbraith, and Fish never recorded his certificate of sale. On July 15, 1903, one Ehorn procured a quitclaim deed to the land from W. H. Kearney, the original mortgagor, and on August 24, 1903, conveyed the property by deed to one H. M. Bollinger, who in turn conveyed to the appellant by deed dated October 19, 1906.

Frank Fish, the purchaser under the foreclosure sale, died intestate, in the state of Nebraska, sometime in the fall of 1896, without having parted with the interest he acquired by his purchase at the sale. He left surviving him a widow and one son as his sole heirs at law, who inherited his interests in the property. These interests were conveyed to the respondents by the son and widow, by deeds dated, respectively, February 26, 1907, and March 20, 1907. Thereafter on September 13, 1907, the sheriff of Stevens county executed and delivered to the respondents, as successors in interest of Frank Fish, a sheriff's deed to the premises, pursuant to the foreclosure sale.

In addition to the foregoing, the evidence tended to show that Bollinger, after his purchase from Ehorn, entered into possession of the property, and remained therein for some three years, building a house and otherwise improving the premises. The land, however, was vacant and unoccupied at the time of the commencement of this action. There was evidence, also, tending to show that Ehorn had no actual knowledge of the foreclosure sale at the time he purchased the land from Kearney.

The principal question presented by the record is, whether the purchaser from Kearney was bound to notice the judgment of foreclosure and the subsequent sale thereunder of the mortgaged property to the purchaser Fish. The appellant contends that he was not, since nothing was of record in the auditor's office that put him upon his inquiry. He concedes that, had a notice of the pendency of the action been filed in that office, or had Fish recorded his certificate of sale therein, or had a sheriff's deed been executed pursuant to the foreclosure sale and recorded in the auditor's office prior to his purchase, he would be bound by constructive notice; but that he was not obligated to take notice of the proceedings recorded in the county clerk's office, even though they affect real property situated in the county in which the office is situated.

But the appellant mistakes the statute. Since the act of March 3, 1893 (Laws 1893, p. 65), a judgment of the superior court has been a lien upon the real property of the judgment debtor in the county where the judgment is rendered from the date of its entry, and this being so, it is of course constructive notice to any one purchasing such real property. It must follow, also, that since the judgment itself is constructive notice, all of the subsequent proceedings had thereunder are, likewise, constructive notice to subsequent purchasers of real property affected by such proceedings. So in this case, since the purchaser from the mort-

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gagor Kearney after the foreclosure and sale was bound to take notice of the decree of foreclosure and the subsequent sale of the mortgaged land thereunder, he took with notice of such proceedings and acquired only such interests as Kearney had therein. But Kearney's interests were effectually cut off by the foreclosure and sale. By his purchase at the foreclosure sale, the purchaser Fish acquired the full equitable title in the property, which could only be defeated by a redemption from the sale within the year permitted by statute, by the mortgagor or his successor in interest. The title became absolute in Fish on the failure to redeem within the time, and descended to his heirs on his death, and was acquired by the respondents by their deeds from such heirs and became perfected in the respondents by the deed from the sheriff.

The fact that a predecessor in interest of the appellant entered into possession of the land for a time, and made improvements thereon, does not affect the respondents title. Doubtless such acts tended to show good faith on the part of the purchaser, but the good faith of either party is not in question; it is a question of the superior title, and we hold the superior title to be with the respondents.

Stang v. Redden, 28 Fed. 11, is a case in point on all of the questions presented here. It was there held under a statute similar to our own that the judicial confirmation of a foreclosure sale vests in the purchasers the full equitable title to the mortgaged premises, whether any deed is executed and delivered to the purchaser or not, and that the foreclosure record in the district court was constructive notice to all persons claiming under the mortgagor of the outstanding equities vested in the purchaser at such foreclosure sale. See, also, on the question of notice, *Fleckenstein v. Baxter*, 114 Mo. 493, 21 S. W. 852.

The judgment appealed from is affirmed.

HADLEY, C. J., ROOT, MOUNT, CROW, and DUNBAR, JJ.,
concur.

[Nos. 7670, 7699, 7698, 7700. Decided October 13, 1908.]

THE STATE OF WASHINGTON, *on the Relation of W. W. Zent,*
Plaintiff, v. SAM H. NICHOLS, *as Secretary of State,*
O. R. Holcomb *et al.*, *Respondents.*¹

THE STATE OF WASHINGTON, *on the Relation of E. K.*
Pendergast, Plaintiff, v. SAM H. NICHOLS, *as*
Secretary of State, Respondent.

THE STATE OF WASHINGTON, *on the Relation of C. E. Coon,*
Plaintiff, v. SAM H. NICHOLS, *as Secretary of*
State, Respondent.

THE STATE OF WASHINGTON, *on the Relation of W. H. White,*
Plaintiff, v. THE SUPERIOR COURT FOR KING COUNTY
et al, Respondents.

STATUTES—TITLES AND SUBJECTS—SUFFICIENCY. As the title of an act need not be a complete index of its contents, and is sufficient if comprehensive enough to call attention to the subject-matter, the title to the direct primary law, Laws 1907, p. 457, being "an act relating to, regulating and providing for the nomination of candidates for public office in the state of Washington, and providing penalties for the violation thereof," is sufficient to include provisions relating to the filing of itemized statements of the candidate's expenditures, provisions for the nomination of candidates for Congress and the United States Senate, provisions relating to fees to be paid by the candidates, and provisions as to who shall be considered nominees and entitled to have their names appear on the ballots to be used at the general election, the selection of candidates for which was the sole purpose of the primary election; since they all legitimately relate to, regulate and provide for nominations of candidates for public office in the state of Washington.

ELECTIONS—NOMINATIONS—PRIMARY ELECTION—FILING STATEMENT OF EXPENSES—TIME FOR—INDEFINITENESS. Where a primary election law is indefinite as to the time within which candidates shall file a list of their expenditures, they must file the same within a reasonable time.

ELECTIONS—CONGRESSIONAL NOMINATIONS—STATE LEGISLATURE. The nomination of candidates for the house of representatives in Congress is a matter for state regulation.

¹Reported in 97 Pac. 728.

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Syllabus.

ELECTIONS—PRIMARY NOMINATIONS—REQUIREMENT OF FEE FROM CANDIDATES—VALIDITY. The provisions in the primary election law requiring candidates for public office to pay a fee for the privilege of running for office is valid, as those seeking the benefit of a proceeding may be required to reimburse the state in carrying the same into effect.

STATUTES—AMENDMENT BY REFERENCE TO TITLE. The primary election law does not violate Const. art 11, § 37, which provides that no act shall ever be revised or amended by mere reference to its title but that the act must be set forth in full; since the constitution was not intended to prevent the enactment of statutes complete in themselves which repeal or amend existing statutes, without setting forth the repealed statutes.

SAME. A reference to a former statute to the effect that in certain instances the same shall not be affected by the terms of the new law superseding and limiting former statutes on the subject, is not an amending or revising of an act by mere reference to its title, when the new law is a complete act within itself.

ELECTIONS—NOMINATIONS—PRIMARY ELECTIONS—QUALIFICATIONS OF ELECTORS. The constitutional qualifications for electors at a general election have no application to primary elections for the nomination of candidates for public office.

SAME—CHALLENGE OF ELECTOR—OATH. The provision of the primary election law, requiring any elector who may be challenged to make oath or affirmation that he intends to affiliate with the party whose ballot he demands, is a reasonable provision to protect the integrity of political parties, and constitutional.

CONSTITUTIONAL LAW—COURTS—POLITICAL QUESTIONS. That a primary election law tends to destroy political parties, which are of general utility and necessity, is a political rather than a judicial question, which cannot be urged upon the courts as affecting the constitutionality of the law.

ELECTIONS—NOMINATIONS—PRIMARY ELECTIONS—DECLARATION OF CANDIDACY—VACANCIES—FAILURE TO SPECIFY TERM. Under the primary election law, Laws 1907, p. 457, § 2, providing that the act shall not apply to special elections for filling vacancies, and § 38 providing that where there is a vacancy in the office of judge, candidates may announce themselves for either the long or short term, a declaration of candidacy for the office of judge in a district in which there was a vacancy which does not specify any term, must be held to be a candidacy for the regular or long term only.

SAME—EXCLUSIVENESS OF NOMINATIONS—JUDGES—STATE OFFICERS. The primary election law, Laws 1907, p. 476, § 38, providing that the judges of the supreme and superior courts shall be considered state

officers within the meaning of the act, which act provides for the nomination of candidates for all state elective offices, supersedes all other forms of nomination, and a candidate for judge of the superior court nominated by a petition or certificate of electors under Bal. Code, §§ 1350 and 1352, is not entitled to have his name appear on the official ballot.

SAME. The legislature may provide that only the names of candidates nominated at the primary election in the manner specified shall appear on the official ballot, since the electors have the privilege of writing or pasting thereon the name of any candidate for whom they desire to vote.

SAME—REQUISITE PERCENTAGE OF VOTES CAST—PERSONS ENTITLED—SECOND CHOICE VOTES. Where there are four candidates for an office, a candidate receiving less than forty per centum of the first choice votes cannot claim to be the nominee at a primary election, when the law expressly declares that such a candidate shall not be a nominee; and he therefore is not in a position to complain of the unconstitutionality of a provision relating to second choice votes.

SAME—FIRST AND SECOND CHOICE VOTES—REASONABLENESS OF PROVISIONS. The legislature has power to provide that where there are four candidates for an office, a candidate receiving less than forty per centum of his party vote shall not be deemed its nominee, and that in such case the candidate receiving the highest number of first and second choice votes shall be the nominee; since there is no interference with the freedom of the elector in casting his first choice ballot, and the provision is a reasonable method of determining the nominees in case there is no party nomination by first choice votes alone.

Original applications filed in the supreme court, October 3d and 5th, 1908, for writs of prohibition or mandamus to the secretary of state. Also, application for a writ of certiorari on behalf of the relator White, to review a judgment of the superior court for King county, Rice, J., entered October 5, 1908, upon sustaining a demurrer to the petition, dismissing an application for a writ of mandamus to the county auditor. Writs denied.

McBurney & Cummings, for relators Zent and White, and *W. H. White pro se*. The act of 1907 is not a complete enactment in itself, and attempts to revise and amend existing statutes expressly referred to without setting forth the stat-

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Citations of Counsel.

utes amended at full length as required by Const. art. 2, § 37. *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. 769; *In re Buelow*, 98 Fed. 86; *In re Dietrick*, 32 Wash. 471, 73 Pac. 506. The law is void as embracing more than one subject and that not expressed in its title, in that it makes it a misdemeanor for a candidate not to file a list of expenses. *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659. Also, in that the provisions relating to candidates for the United States Senate and Congress do not relate to "public officers in the State of Washington." Laws 1907, ch. 209, §§ 2, 5, 7, 10, 24, 36, and 37; *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480, 46 Pac. 1035; *State v. Winsor*, 50 Wash. 407, 97 Pac. 446. The subject-matter of the act is not mentioned in or germane to the title "nomination of officers". *Harland v. Territory*, 3 Wash. Terr. 131, 13 Pac. 453; *State v. Halbert*, 14 Wash. 306, 44 Pac. 538; *Percival v. Cowychee & Wide Hollow Irr. Dist.*, *supra*; *Howlett v. Cheetham*, 17 Wash. 626, 50 Pac. 522; *Armour & Co. v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106; *State ex rel. Henry v. Macdonald*, 25 Wash. 122, 64 Pac. 912; *State ex rel. Nettleton v. Case*, 39 Wash. 177, 81 Pac. 554, 109 Am. St. 874, 1 L. R. A. (N. S.) 152; *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659. The act applies only to the convention method of organized parties, and does not repeal former enactments respecting nominations by petition and certificate. *Meade v. French*, 4 Wash. 11, 29 Pac. 833; *Pierce v. Commercial Inv. Co.*, 30 Wash. 272, 70 Pac. 496; *State ex rel. Purves v. Moyer*, 17 Wash. 643, 50 Pac. 492; *Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91; *Debenture Corp. of London v. Warren*, 9 Wash. 312, 37 Pac. 451. The law tends to disrupt political parties, and therefore violates Const. art. 1, §§ 1 and 4, declaring political power to be inherent in the people, and assuring the right of petition and to peaceably assemble; the legislature has no power to prescribe an exclusive method of nomination by political parties. 2 Bryce, Am. Com. p. 44, ch. 59; p. 57,

ch. 60; *Ladd v. Holmes*, 40 Ore. 167, 66 Pac. 714; *Britton v. Board of Election Com'rs*, 129 Cal 337, 61 Pac. 1115, 51 L. R. A. 115; *Whipple v. Broad*, 25 Colo. 407, 55 Pac. 172; *Cooley*, Const. Lim. p. 174; *Calder v. Bull*, 3 Dallas 386, 1 L. Ed. 648. The legislature has no power to prescribe the qualifications for membership in political parties. *Spier v. Baker*, and *Britton v. Board of Election Com'rs*, *supra*. It cannot be contended that this is not an election. *Ladd v. Holmes* and *Britton v. Board of Election Com'rs*, *supra*; *Murphy v. Curry*, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97; *State ex rel. Rinder v. Goff*, 129 Wis. 668, 109 N. W. 628, 9 L. R. A. (N. S.) 916. If it be an election, within the constitution, an attempt on the part of the legislature to provide additional qualifications is void. *Spier v. Baker*, *supra*. The law is void as violating the secrecy of the ballot. Const. art. 6, § 6. The law being void in part, and the remaining portions failing to constitute a complete uniform act, such as, standing without the void portions, it can reasonably be said the legislature would have enacted, the whole is void. *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368; *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 621, 102 Am. St. 885, 65 L. R. A. 336; *State v. Winsor*, *supra*.

Troy & Sturdevant and *E. K. Pendergast*, for relator Pendergast. It was not intended to repeal the prior laws respecting nominations other than by political parties. *Ervey v. Hill*, 46 Wash. 457, 90 Pac. 590; *State ex rel. Birchmore v. Board* (S. C.), 59 S. E. 145, 14 L. R. A. (N. S.) 850; *Howlett v. Cheetham*, 17 Wash. 626, 50 Pac. 522. In case of doubt between two constructions, the court should adopt that which will afford the citizen the greater liberty in casting his ballot. Const. art 2, § 37; *People ex rel. Eaton v. District Court*, 18 Colo. 26, 31 Pac. 339; *Phelps v. Piper*, 48 Neb. 724, 67 N. W. 755, 33 L. R. A. 53. The act violates Const., art. 1, § 19, requiring that all elections shall be free and equal and that the free exercise of suffrage be not interfered with. *Ballinger v. McLaughlin* (S. D.), 116 N. W. 70;

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Johnson v. Grand Forks County (N. D.), 113 N. W. 1071; *State ex rel. Nettleton v. Case*, 39 Wash. 177, 81 Pac. 554, 109 Am. St. 874, 1 L. R. A. (N. S.) 152; *Ladd v. Holmes*, 40 Ore. 167, 66 Pac. 714, 91 Am. St. 457. A candidate who is deprived of his right to have his name placed on the ballot is deprived of the equal protection of the laws. *State ex rel. Rinder v. Goff*, 129 Wis. 668, 109 N. W. 628, 9 L. R. A. (N. S.) 916; *Murphy v. Curry*, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97. The privacy under section 2 of the primary law is void. *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521. The proviso in section 4, and the proviso in section 8 are void as being an arbitrary legislative interference with the rights of candidates for public office and of political parties to nominate partisan candidates for the judiciary. *Marsh v. Hanly*, 111 Cal. 368, 43 Pac. 975; *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 96; *Britton v. Board of Election Com'rs*, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115.

Harry Ballinger, P. C. Sullivan, and Gordon Mackay, for relator Coon. The provisions relating to second choice votes are unconstitutional. *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; *People v. Board of Election Com'rs*, 221 Ill. 9, 77 N. E. 321; *Johnson v. Grand Forks County* (N. D.), 113 N. W. 1071; *Leonard v. Commonwealth*, 112 Pa. St. 607, 4 Atl. 220; *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 92 N. W. 4, 94 Am. St. 702, 59 L. R. A. 447; *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 833; *Robinson v. Robinson*, 21 R. I. 81, 41 Atl. 1009; *McArdle v. New Jersey*, 66 N. J. L. 590, 49 Atl. 1013, 88 Am. St. 496; *Smith v. Perth Amboy*, 70 N. J. L. 194, 56 Atl. 145; *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217.

The Attorney General and William W. Manier, Assistant, for respondents. The relators have no legal capacity to sue.

Mackay v. Dever, 49 Wash. 439, 95 Pac. 860. The person who contests an election must show either that the illegal votes which were cast changed the result of the election, or that those electors who were prevented from voting would have cast their votes in such a manner as to have changed the result. *Scholl v. Bell*, 31 Ky. Law 335, 102 S. W. 248; *O'Neal v. Minary*, 30 Ky. Law 888, 101 S. W. 951. The legislature has broad powers in the regulation and control of political organizations and nominations of candidates for public office, subject only to the express restriction or limitation imposed by the Federal and State Constitutions. *DeWalt v. Bartley*, 146 Pa. St. 529, 24 Atl. 529, 28 Am. St. 814, 15 L. R. A. 771; *Ladd v. Holmes*, 40 Ore. 167, 66 Pac. 714, 91 Am. St. 457; *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 92 N. W. 4, 94 Am. St. 702, 59 L. R. A. 447; *State ex rel. Labauve v. Michel* (La.), 46 South. 430. The primary election law, being highly remedial in its character, should be liberally construed. *State ex rel. Maring v. Swanger* (Mo.), 111 S. W. 7. This court is very reluctant to declare laws unconstitutional and will resolve every doubt in favor of the constitutionality of the act. *Board of Directors of Middle Kittitas Irr. Dist. v. Peterson*, 4 Wash. 147, 29 Pac. 995; *State ex rel. School District v. Grimes*, 7 Wash. 270, 34 Pac. 836; *Townsend Gas & Elec. Light Co. v. Hill*, 24 Wash. 469, 64 Pac. 778. If the portion of the primary election law relating to the nomination of the nonpartisan judiciary is unconstitutional, the remainder of the act would still be complete within itself, and would stand. *State ex rel. Moodie v. Bryan*, 50 Fla. 293, 39 South. 929; *State ex rel. Adair v. Drexel* (Neb.), 105 N. W. 174; *De France v. Harmer*, 66 Neb. 14, 92 N. W. 159; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368; *In re O'Neill*, 41 Wash. 174, 83 Pac. 104, 3 L. R. A. (N. S.) 558. It was the intention to supersede prior laws. *Northern Pac. R. Co. v. Haas*, 2 Wash. 376, 26 Pac. 869; *Stetson & Post Mill Co. v. Brown*, 21 Wash. 619, 59 Pac. 507, 75 Am. St. 862. Where a new

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law covers the whole subject-matter of an old one, the former law is repealed by implication, though there may be some matters in the old law which are not necessarily obnoxious to any provisions in the new one. *Mansfield v. First Nat. Bank*, 5 Wash. 665, 82 Pac. 789, 999; *Germond v. Tacoma*, 6 Wash. 365, 33 Pac. 961. A repeal of a statute by implication is not governed by section 19, article 2 of the Constitution, requiring the subject of the act to be expressed in its title. *Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005; *State v. Bergfeldt*, 41 Wash. 234, 83 Pac. 177.

Vance & Mitchell, Routhe & Hinman, and *C. L. Holcomb*, for respondent O. R. Holcomb. The law is constitutional. *Ladd v. Holmes*, 40 Ore. 167, 66 Pac. 714, 91 Am. St. 457; *Chamberlain v. Wood*, 15 S. D. 216, 88 N. W. 109, 91 Am. St. 674, 56 L. R. A. 187; *Commonwealth v. Reeder*, 171 Pa. St. 505, 33 Atl. 67, 33 L. R. A. 141; *Kenneweg v. Allegany County Com'rs*, 102 Md. 119, 62 Atl. 249; *State ex rel. Brooks v. Fransham*, 19 Mont. 273, 48 Pac. 1; *State ex rel. Adair v. Drexel* (Neb.), 105 N. W. 174. Statutes regulating the printing of official ballots are constitutional. *Ransom v. Black*, 54 N. J. L. 446, 24 Atl. 489, 1021; *Ladd v. Holmes*, *supra*; *DeWalt v. Bartley*, 146 Pa. St. 529, 24 Atl. 529, 28 Am. St. 814, 15 L. R. A. 771. The right to vote for a candidate of the voter's choice is preserved by provisions for writing or "pasters". *Patterson v. Hanley*, 136 Cal. 265, 68 Pac. 821; *Coughlin v. McElroy*, 78 Conn. 99, 43 Atl. 854, 77 Am. St. 301; *Fletcher v. Wall*, 172 Ill. 426, 50 N. E. 230, 40 L. R. A. 617; *Voorhees v. Arnold*, 108 Iowa 77, 78 N. W. 795; *People ex rel. Oatman v. Fox*, 114 Mich. 652, 72 N. W. 611; *Price v. Lush*, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467; *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 33 Am. St. 491, 16 L. R. A. 754; *State ex rel. Crow v. Hostetter*, 187 Mo. 636, 39 S. W. 270, 59 Am. St. 515, 38 L. R. A. 208; *People ex rel. Goring v. President etc. of Wappinger's Falls*, 144 N. Y. 616, 39 N. E. 641; *Howser v. Pepper*, 8 N. D. 484,

79 N. W. 1018; *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500; *Cole v. Tucker*, 164 Mass. 486, 41 N. E. 681, 29 L. R. A. 668; *People ex rel. Bradley v. Shaw*, 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 606; *State ex rel. Attorney General v. Dillon*, 32 Fla. 545, 14 South. 383, 22 L. R. A. 124; *Miner v. Olin*, 159 Mass. 487, 34 N. E. 721; *Healey v. Wipf* (S. D.), 117 N. W. 521; *Morrow v. Wipf* (S. D.), 115 N. W. 1121; *Katz v. Fitzgerald* (Cal.), 93 Pac. 112; *Schostag v. Cator* (Cal.), 91 Pac. 502; *Ransom v. Black*, 54 N. J. L. 446, 24 Atl. 489; *DeWalt v. Bartley*, *supra*; *Slaymaker v. Phillips*, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842; *State ex rel. Rinder v. Goff*, 129 Wis. 668, 109 N. W. 628, 9 L. R. A. (N. S.), 916; McCrary, Elections, 699-700; Paine, Elections, 699-707; 10 Am. & Eng. Ency. Law (2d ed.), 587. The duty of the canvassing board to declare the result is absolute. *State ex rel. Harvey v. Mason*, 45 Wash. 234, 88 Pac. 126; *State ex rel. King v. Trimbell*, 12 Wash. 440, 41 Pac. 183. As to the terms of judicial offices, see *State ex rel. Dyer v. Twichell*, 4 Wash. 715, 31 Pac. 19; *State ex rel. Linn v. Millett*, 20 Wash. 221, 54 Pac. 1124; *State ex rel. Murphy v. McBride*, 29 Wash. 335, 70 Pac. 25. There is a distinction between vacancies in the term of one holding the office, and vacancies in the office. Paine, Elections, pp. 211-220; *State v. Black*, 22 Minn. 336. In the absence of any declaration to the contrary, the regular term of office as fixed by law would be presumed to be intended. *State ex rel. Dyer v. Twichell*, *supra*. The title to the act fully sets forth the subject of the legislation. *State ex rel. Griffith v. Newland*, 37 Wash. 428, 79 Pac. 963; *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *Baker v. Prewett*, 3 Wash. Terr. 474, 19 Pac. 149; *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Fraternal Knights & Ladies*, 35 Wash. 338, 77 Pac. 500; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91; *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110;

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Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36. Prior laws were repealed by implication. Laws 1907, ch. 209, § 2; *Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005; *State v. Bergfeldt*, 41 Wash. 234, 83 Pac. 177; *Mansfield v. First Nat. Bank*, 5 Wash. 665, 32 Pac. 789, 999; *Baum v. Sweeny*, 5 Wash. 712, 32 Pac. 778; *State v. Carbon Hill Coal Co.*, 4 Wash. 422, 30 Pac. 728; *State ex rel. Dustin v. Rusk*, 15 Wash. 403, 46 Pac. 387; *Leavitt v. Chambers*, 16 Wash. 353, 47 Pac. 755. Where there is a neglect of a person to avail himself of a right given by law, he cannot after finding himself defeated at the polls ask the court to nullify the expressed will of the voters upon the error or wrong of some official which he could by reasonable diligence have had corrected. *State ex rel. Brooks v. Fransham*, *supra*; Laws 1907, p. 457, ch. 209, § 25. The legislature has power to pass a law regulating the primaries of the stronger parties and excluding the weaker parties therefrom and from its provisions. *Kenneweg v. Allegany County Com'rs.* and *State ex rel. Adair v. Drexel*, *supra*; *State ex rel. Clawson v. Bell* (Ind.), 82 N. E. 69, 13 L. R. A. (N. S.) 1013; *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 92 N. W. 4, 94 Am. St. 702, 59 L. R. A. 447.

Merritt, Oswald & Merritt, for respondent Hay, cited. *Healey v. Wipf* (S. D.), 117 N. W. 521; *State ex rel. Birchmore v. State Board of Canvassers* (S. C.), 59 S. E. 145, 14 L. R. A. (N. S.) 850; *State ex rel. Hewen v. Elliott*, 17 Wash. 18, 48 Pac. 734; *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 92 N. W. 4, 94 Am. St. 702, 59 L. R. A. 447.

FULLERTON, J.—In these proceedings the several relators named assail the constitutionality of the act of March 15, 1907, known as the "Primary Election Law." Laws 1907, p. 457. While the questions presented are not the same in all the proceedings, they present many common questions, and can best be considered by treating the several proceedings as one, noticing under each separate title only those questions applicable to that particular proceeding. It is proper to

mention, also, that the exigencies of the case require an immediate decision, and that it is for this reason that our discussion of the questions presented is somewhat perfunctory, not that we do not realize their importance and difficulty. With this explanation, we pass directly to the consideration of the merits of the controversy.

It is first contended that the act is in violation of art. 11, § 19, of the constitution, which provides that: "No bill shall embrace more than one subject and that shall be expressed in its title." The argument is that the act contains matters not germane to its title, so intermingled with matters that are germane that the valid portion cannot be separated from the invalid portion without leaving the act meaningless; and that the act, being thus void in part, and the portions remaining failing to constitute a complete and uniform act, it is void as a whole. The title of the act is as follows:

"An Act relating to, regulating and providing for the nomination of candidates for public office in the state of Washington, and providing penalties for the violation thereof, and declaring an emergency."

This court has often held that the title of an act, in order to comply with the constitutional provisions above quoted, need not be an index to the contents of the act; that the purpose of the title is to call attention to the subject-matter of the act so that any one reading it may know what matter is being legislated upon, and it is sufficient when it is broad enough to accomplish that purpose. For the various provisions constituting the act, the body of the act must be consulted, the title being neither expected nor required to give details. *State v. Scott*, 32 Wash. 279, 73 Pac. 365; *State v. Fraternal Knights & Ladies*, 35 Wash. 338, 77 Pac. 500; *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36; *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462; *State ex rel. Zenner v. Graham*, 34 Wash. 81, 74 Pac. 1058; *Shortall v. Puget Sound Bridge & Dredging Co.*, 45 Wash. 290, 88 Pac. 212; *State v. Winsor*, ante p. 407, 97 Pac. 446. The title of the act

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in question, it will be observed, is at once broad and comprehensive. Any provision which legitimately relates to, regulates, or provides for the nomination of candidates for public office in the state of Washington, can be enacted thereunder. So measured, we do not find anything within the act that is not strictly within the title.

The provisions most especially dwelt upon as being outside of the title are §§ 30 and 31, which provide that candidates who contest for a primary nomination must file an itemized statement of their expenditures incurred while endeavoring to secure a nomination, under a penalty for failure to do so; those parts of §§ 7, 9, 10, 24, and 36, and other sections, which relate to the nomination of candidates for members of the house of representatives and United States senator; § 5 providing for the payment of fees by candidates for Congressional office; and § 38 providing who shall be considered as nominees at the primary election and entitled to have their names appear on the official ballot.

But we think even these sections fairly germane to the title. The sections relating to filing itemized statements of the expenditures incurred are objectionable on account of their indefiniteness, rather than for the reasons suggested; but the legislative intent is clearly understood even on this point, and this is sufficient to comply with the constitutional requirements. The indefiniteness relates to the time when these statements are required to be filed, but in such a case the rule is that they must be filed within a reasonable time. But more than this, these sections could be eliminated without affecting the remainder of the act, and it is of but little moment in so far as the cases of these relators are concerned whether we hold the provisions valid or invalid. The nomination of candidates for the house of representatives in Congress is clearly a matter for state regulation, and such regulation may be properly provided under a title relating to the nomination of candidates for public office in the state of Washington. The title does not necessarily mean that the office for which

the person is nominated shall be in the state of Washington; it is enough if the nomination itself is to be made therein. The provisions regulating candidates for the United States senate fall within the same rule. It must be remembered that we are discussing the question whether such a provision may properly be enacted under a title such as this act possesses, not the effect or binding force of a nomination obtained thereunder. This latter question is not in these proceedings, and we express no opinion thereon. Again, it can be said of these provisions, as was said of the provision relating to the filing of the lists of expenditures, they can be eliminated without affecting any of the rights of these relators or the validity of the remainder of the act. The provision in relation to fees is within the scope of the act. The right to exact a reasonable fee for the privilege of running for office may be sustained on the principle that fees in actions and proceedings in courts and for filing and recording papers are sustained, namely, that those who seek the benefit of a particular proceeding provided by law may be compelled to reimburse the state for a portion of the costs the state incurs in maintaining the instrumentalities necessary to carry into effect the particular proceeding. In other words, the state but asks the candidates for office under a particular law to reimburse it for a part of the expenses it incurs in carrying that law into effect. This clearly the state may lawfully do. Lastly, under this head it is objected that the legislature cannot, under an act providing for the nomination of candidates, legislate with reference to the ballot to be used at the general election. But we think this contention untenable. The only purpose of the primary election was to select candidates whose names shall appear on the official ballot, and this being its sole purpose, any provision relating to that purpose must be germane to the act. We conclude, therefore, that this act in its entirety is within the scope of its official title.

It is also contended that the act is in violation of § 37, art. 11, of the constitution. That section provides that no act

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shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth at full length. The evil which this provision of the constitution was intended to remedy was a habit, which often proved pernicious, of amending statutes by inserting therein certain words or substituting one phrase for another, without setting forth the act or section as it would read with the amendment inserted. This form of amendment was well calculated to mislead the careless as to its effects, and was, perhaps, sometimes drawn in that form for the express purpose of misleading, and the constitution makers wisely put a check upon it. But the provision was never intended to prevent the enactment of statutes complete in themselves which repealed or amended existing statutes. Indeed, the very purpose of a statute is to change the existing laws as to the particular matter legislated upon, and if the legislature is without power to pass such an act without first hunting up all of the provisions of the existing laws affected by it, and setting them forth as they will stand as amended, legislation is at a standstill. The act in question, as we view it, is a complete act within itself. While it necessarily changes existing statutes by superseding some and limiting the effect of others, it requires no reference to other statutes to determine its meaning in the sense prohibited by the constitution. True, it refers to other statutes in terms, and provides that in certain instances the statute referred to shall not be affected by the terms of the new statute; yet this, we think, is not amending or revising an act by mere reference to its title. The act referred to is in no wise altered or amended; no change is made in its text; its scope only is limited to the particular cases enumerated. This we hold does not require the setting forth at full length of the statute affected. The case of *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. 769, is not contrary to this view. As explained in the case of *In re Dietrick*, 32 Wash. 471, 73 Pac. 506, we there held that the statute under consideration was merely

amendatory of a former law—not an independent act—and as such could not stand alone, or be intelligently applied without a reference to the former law.

Section 12 of the primary act provides that, when a voter at the primary election demands the ticket of a particular party and his right to vote that ticket is challenged, he shall make oath or affirmation that he intends to affiliate with the party whose ballot he demands at the ensuing election, and that he intends to support generally the candidates of that party. It is contended that this section adds a requirement to the qualifications of electors in addition to the constitutional requirements, and for that reason renders the entire act void. Were the primary election so far such an essential part of the general election as to make the constitutional provision relating to the qualification of electors entitled to vote at the general election applicable thereto, then there would be force in this objection; but we do not think the sections of the constitution providing the qualifications of electors applicable to the primary election provided for by this statute. It is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office to be voted for at the general election. Being so, the qualifications of electors provided by the constitution for the general election can have no application thereto.

From the fact that the state has assumed to provide an official ballot for the general election, it must resort to some process of selection to determine the candidates whose names shall appear upon the ballot. It cannot print the names of the entire list of electors on the ballot, nor can it print thereon the name of every elector who may choose to become a candidate. Such a proceeding would make the ballot too cumbersome for any practical purpose, and in consequence the election a farce. Since, then, the state by its legislature must resort to some process of selection, the only limitation that can be put thereon is that the process adopted be reasonable. The legislature should not go to extremes in either direction.

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To print the names of every person who desires to become a candidate would be an extreme in the one direction, while to print only the names of the candidates of the party dominant at the last preceding election would be an extreme in the other. But between the extremes it is at once apparent that there is a wide field for choice, within which it cannot safely be said that the legislature has violated its just discretion. The method here adopted the court cannot say is unreasonable. While it deprives some of the minority parties of privileges which might properly have been granted them, yet the legislature must protect the state against the future. A too great multiplication of parties might result if all associations of persons claiming to be such were so recognized—three tailors of Tooley street once claimed to be “the people of England”—thus entailing upon the state excessive costs in the conduct of primary elections without corresponding benefits. No doubt the qualification here complained of was inserted to protect the integrity of political parties. The legislature had provided for party ballots for use at the primary election, and it was but just that some restraint be put upon the privilege of demanding and voting a particular ballot. So far, therefore, from being an unwarranted restriction, it seems to us that if party integrity is to be preserved, this provision is highly proper and commendable, and could have been made with profit much more stringent than it actually is.

The last general objection to be noticed is that the law tends to destroy political parties. Counsel confess that they can find no specific provision of the constitution on which to base the contention, but they assert the general utility and necessity of parties, and argue therefrom that legislation tending to destroy them must receive the condemnation of the courts. It has seemed to us, however, that this is a political rather than a judicial question, and that an appeal from the legislative decision must be made to the people rather than to the courts.

We are aware that some of the conclusions reached by us on the questions discussed are not in accord with the decisions of courts of other jurisdictions on similar questions. We have not followed them because we feel them to be unsound. It would have given us more satisfaction to have noticed them at the proper place, but want of time and space forbids. The fact is mentioned here out of deference to counsel appearing for the respective parties, whose learning and patient research have brought before us all of the law extant upon the subjects discussed.

We will now notice the particular contentions. At its session in 1907, the legislative assembly created a separate judicial district from the counties of Adams, Benton and Franklin. The relator Zent was appointed judge thereof to hold office until the next general election and until his successor was elected and qualified. In due time he filed his declaration of candidacy for nomination at the primary election. The respondent Holcomb also filed a declaration of candidacy for the office of superior judge in the district of the counties named, but did not specify therein for what term he desired to become a candidate. The secretary of state, before whom the declaration was filed, construed the declaration as one for the term commencing on the second Monday in January, 1909, and placed his name upon the primary ballot as a non-partisan candidate for judge, along with the name of the relator Zent. Holcomb received a majority of the votes cast at the primary election, and was declared the nominee by the canvassing board. Zent applies to restrain the issuance of a certificate of nomination to him, and to prevent the certification of his name to the auditors of the several counties named, as the candidate for judge whose name shall appear on the official ballot.

In addition to the general objections to the constitutionality of the act already discussed, the relator makes the point that the construction placed upon the respondent's declaration was unwarranted and void, and that in consequence there is no nominee for the office of judge of the superior court for the

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counties named. This contention is unfounded. There was indeed a short and a long term for which a judge might have been nominated, but the primary law applies to the long term only, unless specially designated otherwise. By the second section of the act it is expressly provided "that this act [the primary election law] shall not be held to refer to special elections for filling vacancies for unexpired terms . . . ;" while § 38 provides that, where there is a vacancy in the *office of judge*, candidates may announce themselves for either the long or the short term. But since there was no announcement made, we think the declaration could only apply to the term commencing on the second Monday in January, 1909, and the secretary of state correctly so ruled.

The relator White sought to be nominated for the office of judge of the superior court of King county, by petition as prescribed in §§ 1350 and 1352 of Ballinger's Code (P. C. §§ 4932, 4934.) To that end he procured a certificate of nomination subscribed by the requisite number of electors, and proffered the same for filing at the office provided therein for receiving the same. The filing was refused, and this proceeding was instituted to compel the filing of the certificate and to require the proper officers to print his name on the official ballot as a candidate for judge of the superior court of King county. In addition to urging the invalidity of the primary law, he contends that, if the court deems the act constitutional, he is nevertheless entitled to have his name appear upon the official ballot for the reason that the statute under which he is proceeding is still in force, not having been superseded or modified by the primary election law. The section of the primary law relating specially to the nomination of judges reads as follows:

"Sec. 38. Judges of the supreme and superior courts, state senators and representatives shall not be considered state officers within the meaning of the provisions of this act relating to first choice and second choice voting. When there are to be elected at any general election, two or more judges of the

supreme court or superior court of any county, the candidates for each respective office whose names are to be placed upon the general election ticket, shall be determined as follows: The number of candidates, equalling the number of judicial positions to be filled, who receive the highest number of votes at the primary election, shall be candidates for such respective offices, and their names shall appear on the general election ticket under the designation of such respective offices. Where a vacancy or other cause shall necessitate the election of a judge for a short term and at the same election one or more judges are to be elected for the full term, candidates may announce themselves for either the short or full term and the ballots shall be arranged accordingly." Laws 1907, p. 476.

Manifestly it was the purpose of this provision to do away with all other forms of nomination, in so far as the official ballot is concerned, than the one therein prescribed. The legislature by this section, whether wisely or not, has seen fit to provide for placing on the official ballot only the names of those candidates who have been nominated in the particular way pointed out. This we hold the legislature had the right to do, it being a reasonable exercise of its powers. True, it deprives minority parties, casting less than ten per centum of the entire vote, of voting at the primary election for candidates whose names are entitled to appear on the official ballot, and prevents the people from selecting by petition particular candidates and having their names put upon the official ballot. But it deprives no one of the right to vote for the candidate of his choice at the general election. He may write or paste the name of his candidate thereon and have the same counted as rightfully as if his name were printed on the ballot. This is a right the courts are uniform in maintaining. With possibly one exception, every court which has passed upon the question maintains the right of the individual elector to vote for the person of his choice for a particular office, regardless of whether his name is on the official ballot or not. Since, therefore, the elector is not deprived by this act of voting at the general election for the candidate of his choice, we

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hold the act within the rightful powers of the legislature. The relator Pendergast presents the question presented by the relator White, and his application requires no separate discussion.

The relator Coon was a candidate for the republican nomination for the office of lieutenant governor, there being more than four candidates for that nomination. The relator received a plurality of all the first choice votes cast, but failed to receive more than forty per centum of such votes, and likewise failed to receive a plurality of all first and second choice votes. Notwithstanding these facts, he now contends that his name should appear on the official ballot as the republican nominee for the office, and by this proceeding seeks to compel the secretary of state to so certify the ballot. The basis for this contention is the claim that the second choice provisions of the direct primary law are unconstitutional.

So far as this particular case is concerned, it would avail the relator nothing to uphold his contention as to the invalidity of the law, for the legislature has declared in express terms that a candidate receiving less than forty per centum of the first choice votes shall not be the nominee where there are four or more candidates for any state office, and should we declare the alternative method of nomination void, it would simply nullify the law as to that particular office. It would not result in the nomination of a candidate who under the express terms of the law did not receive the requisite vote. But this feature of the law has been assailed in other cases, and we deem it proper to dispose of the contention made at this time.

The principal argument against the second choice provision is that it interferes with the freedom of election guaranteed by the constitution, and compels the elector to vote for a person other than the candidate of his choice. This contention is untenable. The elector has the utmost freedom of choice in casting his first choice ballot, though his choice will not avail him unless at least forty per centum of his party

agree with him. It was entirely competent for the legislature to provide that a candidate receiving less than forty per centum of his party vote should not be deemed its nominee, and with such a provision in the law it was incumbent on the legislature to provide some other method of nomination whenever a candidate failed to receive the required vote at the primary. It might have provided a second primary, but a second primary would perhaps prove equally fruitless, unless the number of candidates to be voted for were restricted. If the candidates to be voted for at the second primary were restricted to the two or three receiving the highest vote at the former primary, then all those who did not favor these particular candidates might complain with equal justice that they were compelled to vote for candidates other than those of their choice. So long as voting is by ballot, an official ballot is a convenience if not a necessity, and some authority vested somewhere in government must determine the names which shall appear on that ballot, and those names must necessarily be few in number; and, we repeat, any reasonable method prescribed by the law-making power which accomplishes this result must be sustained by the judicial department of government. The courts have no concern with its wisdom or policy.

The several applications are denied.

HADLEY, C. J., DUNBAR, MOUNT, and RUDKIN, JJ., concur.

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Citations of Counsel.

[No. 7597. Decided October 13, 1908.]

THE STATE OF WASHINGTON, *on the Relation of George E. Boomer, Plaintiff, v. SAM H. NICHOLS, as Secretary of State, Respondent.*¹

ELECTIONS—NOMINATIONS—PRIMARY ELECTIONS — FEES — REASONABLENESS. It is not unreasonable or in excess of legislative power to exact a fee of \$60 from a nominee for the office of governor, under the primary election law, based upon a percentage of the annual salary of \$6,000, for the privilege of having the candidate's name printed on the official ballot.

Original application filed in the supreme court September 14, 1908, for a writ of mandamus to the secretary of state. Denied.

Charles A. Riddle, for relator Boomer. Section 5 of the primary law violates Const. art. 6, § 1. *Cooley*, Const. Lim. (6th ed.), 753; 18 Cent. Dig. Elections, § 13; *Johnson v. Grand Forks County* (N. D.), 113 N. W. 1071; *Spier v. Baker*, 120 Cal. 370, 52 Pac. 715; *People v. English*, 189 Ill. 622, 29 N. E. 678, 15 L. R. A. 131; *State ex rel. Whitney v. Findlay*, 20 Nev. 198, 19 Pac. 241, 19 Am. St. 346; *Livesley v. Litchfield*, 47 Ore. 248, 83 Pac. 142, 114 Am. St. 920; *State ex rel. Nettleton v. Case*, 39 Wash. 177, 81 Pac. 554, 109 Am. St. 874, 1 L. R. A. (N. S.) 152; *State ex rel. Adair v. Drexel* (Neb.), 105 N. W. 174; *State ex rel. Thompson v. Scott*, 99 Minn. 145, 108 N. W. 828; *Morrow v. Wipf* (S. D.), 115 N. W. 1121; *Ballinger v. McLaughlin* (S. D.), 116 N. W. 70; *People ex rel. Breckton v. Board of Election Com'rs*, 221 Ill. 9, 77 N. E. 321; *Kenneweg v. Allegany County Com'rs*, 102 Md. 119, 62 Atl. 249. The invalid or unconstitutional part of the statute cannot be separated from the rest, leaving remaining a valid statute capable of being executed. *Cooley*, Const. Lim. (6th ed.), 210; *Black*, In-

¹Reported in 97 Pac. 733.

terpretation of Laws, 26; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368; *State ex rel. Adair v. Drexel*, *supra*.

The Attorney General and I. B. Knickerbocker, Assistant,
for respondent.

PER CURIAM.—The relator, being the regular nominee of the socialist party for the office of governor of the state of Washington, tendered his certificate as such to the secretary of state, for filing, in order that his name might be certified for printing upon the official ballot. His application to file was refused, for the reason that he declined to pay the fee required by §§ 5 and 26 of the primary act. This is a proceeding in mandamus, brought to compel the secretary of state to receive and file the certificate of nomination without the payment of the prescribed fee; the contention being that the part of the act requiring the fee to be paid is unconstitutional and void.

In another case we held that the exaction of a reasonable fee, under similar circumstances, was within the powers of the legislature; and, indeed, counsel for relator frankly concedes that the legislature has that power; but he argues that this is an unreasonable exaction, and is void because of its unreasonableness, rather than because of the want of power of the legislature to exact a fee. The amount of the fee required is based on a per centum of the salary of the office for which the person is a candidate, instead of a fixed fee for all candidates alike, and it is this feature that is thought to render the requirement void. But we can see no reason why this is not a reasonable regulation. The fee exacted must be measured by the standard of the individual case, not by what others may be required to pay for running for another and different office. The fee required of the applicant is \$60. The salary of the office to which he aspires is \$6,000 per annum, and we cannot hold the exaction in excess of legislative power.

The application will be denied.

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Opinion Per RUDKIN, J.

[No. 7299. Decided October 18, 1908.]

P. A. SILVERSTONE *et al.*, Respondents, v. PAUL S. NORTON,
Appellant.¹

TAXATION—ENFORCEMENT OF TAXES—STATUTORY PROVISIONS—TAX DEED—BY WHOM EXECUTED—CITY TAXES. Under the express provisions of Laws 1893, p. 167, which is prospective only, city taxes levied under prior laws must be collected and enforced in the manner provided by the city charter; and for taxes levied in Seattle in 1891, the tax deed must be executed by the city treasurer (Root, J., dissenting).

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 5, 1907, upon findings in favor of the defendant, in an action to quiet title. Reversed.

A. C. MacDonald and *F. R. Conway*, for appellant.

Edward Judd, for respondents.

RUDKIN, J.—This was an action to quiet title. The only question in the case is the validity of the tax deed, issued by the city treasurer of the city of Seattle on the 12th day of January, 1905, pursuant to a tax sale made on the 26th day of July, 1892, for delinquent city taxes levied during the year 1891. The validity of the tax deed depends upon the authority of the city treasurer to issue the same at the time and under the circumstances stated, the plaintiffs contending that he had no such authority by reason of the provisions of the act of March 9, Laws 1893, page 167. The act cited provides, in general terms, that, from and after its passage, cities of the first class shall fix their tax rate by ordinance, the ordinance shall be certified to the county auditor, the county auditor shall extend the city taxes on the county rolls, and such taxes shall be collected by the city treasurer in the same manner as state and county taxes. But the act of 1893 is

¹Reported in 97 Pac. 663.

prospective in its terms. Nothing in its provisions, directly or indirectly, expressly or by implication, authorizes or empowers the county treasurer to issue tax deeds upon sales made prior to the passage of that act. On the contrary, section 7 of the act expressly provides that "all delinquent taxes now or hereafter owing to any city *not levied* as provided in this act shall be collected and enforced in the manner provided by the charters of the respective cities by which the same were levied." Taxes of the city of Seattle for the year 1891 were not levied under the provisions of the act of 1893, and therefore such taxes must be collected and enforced under the provisions of the city charter, and deeds must be executed by the city treasurer. The county treasurer has not even the semblance of authority to issue deeds in such cases.

The judgment of the court below is therefore reversed, and the cause is remanded with directions to dismiss the action.

MOUNT, CROW, and DUNBAR, JJ., concur.

HADLEY, C. J., and FULLERTON, J., took no part.

ROOT, J. (dissenting.)—I dissent. The appellant in his brief makes the following statement:

"It is conceded by both parties that: At the time of the execution of the deed by the city treasurer, the whole scheme for the collection of municipal taxes, including the sale of land to satisfy the same and the execution of deeds for land so sold, had been so changed by various acts of the legislature of the state of Washington that the duty of executing such deeds devolved upon the county treasurer, instead of the city treasurer."

The majority opinion ignores this concession, and relies upon § 7 of the act of 1893. Laws 1893, p. 167. But that section applies only to taxes "delinquent and owing" *at the time that statute was enacted*, or "delinquent" *then* and to become owing *thereafter*. The taxes referred to in the case at bar were not delinquent when the statute was passed.

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Statement of Case.

Neither were they owing nor did they become "owing" thereafter. They had been paid and satisfied by the sale of the property long before the statute was enacted. Hence that section of the statute has no application to this case.

Section 4 of the act says:

"The county treasurer . . . is hereby constituted ex officio collector of the city taxes," etc.

Section 9 of the statute says:

"This act shall supersede all conflicting provisions of laws or charters of cities of the first class relating to the assessment, equalization and collection of general taxes for municipal purposes."

With due deference to the majority, I believe the deed in question should have been issued by the county treasurer.

[No. 7275. Decided October 14, 1908.]

JOHN BEST, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

NEW TRIAL—ORDER GRANTING—SPECIFICATION OF GROUNDS—NECESSITY. In granting a new trial, asked on several grounds, it is discretionary to make a general order without stating specific reasons therefor, and not error to refuse a request to state the specific grounds.

APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. An order granting a new trial for insufficiency of the evidence cannot be reviewed on appeal except for abuse of discretion.

SAME—REVIEW. Where a new trial, asked on several grounds, one being the insufficiency of the evidence, was granted without specifying the grounds, the order cannot be reversed on affidavits that only one ground was considered.

Appeal from an order of the superior court for King county, Frater, J., entered December 4, 1907, granting a new trial on motion of the plaintiff, after a verdict of the jury rendered in favor of the defendant, in an action for personal injuries. Affirmed.

¹Reported in 97 Pac. 772.

Scott Calhoun and James E. Bradford, for appellant.

Longfellow & Fitzpatrick and Reynolds, Ballinger & Hutson, for respondent.

Crow, J.—Action by John Best against the city of Seattle, to recover damages for personal injuries. On trial the jury returned a verdict in favor of the defendant. Thereafter and on plaintiff's motion an order for a new trial was made and entered, from which the defendant has appealed.

Respondent's motion for a new trial was based on two grounds, (1) insufficiency of evidence to sustain the verdict, and (2) error of law occurring at the trial. The order granting the new trial was general in its terms, and failed to disclose the particular grounds upon which the action of the trial court was based. Thereafter the appellant, by motion, supported by affidavits now a part of the record, asked the trial court to modify its former order by setting forth and stating therein the particular grounds upon which the new trial was granted. The trial court, by written order, denied this motion. By its affidavits the appellant contended that the sole ground on which the new trial was granted was that the trial court had erred in one of its instructions to the jury, and that no other question was presented or considered. Appellant now makes the following assignments of error: (1) That the trial court erred in refusing to sign an order setting forth its reasons for granting the new trial; (2) that it erred in refusing to grant appellant's motion to modify its order granting the new trial; and (3) that it erred in granting the new trial.

The record is devoid of any order or other statement of the trial judge setting forth any particular reason for the granting of respondent's motion. It was unquestionably within the discretion of the trial court to sign and enter a general order without stating specific reasons, where several grounds were incorporated in the motion. It would be a novel and unwarranted proceeding for this court, acting solely upon affidavits

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of the parties and their witnesses, to now reverse the trial court, by holding that it considered but one ground for a new trial, that it granted the motion upon that ground only, and that it erred in not signing and entering an order reciting the fact, especially when we would be doing so in the absence of any written order or statement of the trial judge disclosing the points considered and determined by him. Appellant's contentions based upon its first and second assignments of error are without merit and cannot be sustained.

The order made and entered by the trial court having failed to disclose the grounds upon which its action was based, the same cannot be reviewed by us upon this appeal. We are unable to determine from the record the particular ground upon which the motion was granted. If it was because of insufficiency of evidence to sustain the verdict, one of the grounds assigned in the motion, that was a matter within the sound discretion of the trial judge who heard the conflicting evidence, saw the witnesses, observed their manner upon the stand, and heard them testify. His conclusions thereon could be disturbed in this court only for an abuse of discretion, which has neither been shown nor claimed. *Bender v. Rinker*, 21 Wash. 636, 59 Pac. 504; *Colvin v. Northern Pac. R. Co.*, 42 Wash. 5, 84 Pac. 616.

The judgment is affirmed.

HADLEY, C. J., DUNBAR, MOUNT, and FULLERTON, JJ., concur.

RUDKIN and ROOT, JJ., took no part.

[No. 7137. Decided October 14, 1908.]

ALBERT E. TILLS, *Respondent*, v. GREAT NORTHERN
RAILWAY COMPANY, *Appellant*.¹

MASTER AND SERVANT—VICE PRINCIPALS—OPERATION OF RAILROADS—SUDDEN STOPPING OF CAR. A section foreman in charge of a hand car, which all of the men are propelling by hand on their way to their work, is a vice principal, and the master is liable for injuries sustained by one of the crew through his negligence, where it appears that, by his direction, knowing that he would soon meet a freight train, the car was being driven at a reckless rate of speed, down grade, where there were many curves and bluffs obstructing the view, in an endeavor to reach his destination before arrival of the train, and that, upon the train's appearing in sight, he suddenly applied the brakes without warning, whereby the plaintiff was thrown from the car.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$26,985, for personal injuries, reduced to \$20,000 by the trial court, is not excessive, where it appears that the plaintiff, a section man, forty-three years of age, in good health, earning \$2.25 per day, was run over by a hand car, dislocating his vertebra, that he is paralyzed from his hips down, has completely lost the control of his bowels, urinary and other organs, and is completely helpless and will be confined to his bed for the remainder of his life, and suffers constantly.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 26, 1907, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained by a section man thrown from a hand car. Affirmed.

L. C. Gilman (*James B. Howe* and *R. C. Saunders*, of counsel), for appellant.

Arthur C. Dresbach, for respondent.

Crow, J.—This action was commenced by Albert E. Tills against the defendant, Great Northern Railway Company, to recover damages for personal injuries. From a judgment in his favor, the defendant has appealed.

¹Reported in 97 Pac. 737.

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The cause was submitted upon evidence offered by the respondent, the arguments of his counsel, and the instructions of the court. The undisputed evidence shows that, a short time prior to the date on which the accident occurred, the respondent was employed by one Ward, a section foreman, to work for appellant as a section hand; that from Index, Washington, west to the place where the accident occurred, appellant's railway track, with a descending grade, followed the right bank of the Skykomish river, a mountain stream; that curves, bluffs, and timber concealed approaching trains; that respondent, and other section hands under Ward's direction, loaded a hand car with crowbars, jackscrews, shovels and other tools, and with Ward in charge started westward thereon down grade; that respondent, standing between two section men, was riding backward, while Ward, with two other section hands, stood facing him; that respondent stood with one foot on the car platform and the other upon a jack-screw; that all the men, including Ward, were propelling the car by using a handle bar provided for that purpose; that Ward, expecting to meet a freight train coming from the west, was anxious to reach its destination before its arrival; that he therefore caused the men to propel the car at a speed of seventeen miles per hour, repeatedly giving the order: "Up and down," thereby directing its movements; that on rounding a sharp curve Ward saw the approaching freight train, and placed his foot upon the brake so suddenly as to instantly check the car, without any warning to respondent or the other men; that at the same instant he called out: "The freight!" and that by reason of the sudden stop, the respondent, taken unawares, was thrown to the ground in front of the car, which ran over and severely injured him.

The appellant has based numerous assignments of error upon instructions given and refused. It is unnecessary to state these instructions, as appellant's controlling contention is that the act of Ward which resulted in the injury to respondent was not the act of a vice principal, but the act of

respondent's fellow servant, for which appellant is in no manner liable. It insists that Ward's relation to appellant and the other men was only that of a "supervising employee;" that in a portion of his duties he represented the master; that in others he acted as a co-laborer with the section men; that, while in the performance of the former he was a vice principal, he was in the performance of the latter a fellow servant; and that the relation of Ward to the other employees of appellant in this case must be determined by the nature of the acts he and they performed. In substance, the appellant contends that while aiding the section men in propelling the car, and when he himself applied the brake, Ward was their fellow servant, and not a vice principal representing the master. In support of this contention the appellant has cited, with others, the following cases from courts of other states, upon which it specially relies: *Gann v. Nashville etc. R. Co.*, 101 Tenn. 380, 47 S. W. 493, 70 Am. St. 687; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Davis v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. 708, 35 Am. St. 133; *Hammond v. Chicago etc. R. Co.*, 83 Mich. 334, 47 N. W. 965; *Olson v. St. Paul etc. R. Co.*, 38 Minn. 117, 35 N. W. 866.

A sharp conflict of authority exists on this question, a contrary position having been taken by other courts. In *Haworth v. Kansas City Southern R. Co.*, 94 Mo. App. 215, 68 S. W. 111, on a state of facts strikingly similar to those before us, the court said:

"A superior or vice-principal in charge of workmen does not become a co-workman whenever he actively assists in the manual performance of a task, instead of superintending it. If he chooses to take on himself the role of laborer he may do so, but he does not thereby divest himself of his responsibility as foreman or superintendent and his duty to see that work is done in a careful way. The judgment and care which he must use as superintendent to see that precautions are taken to avoid harm to his gang, continue to be exacted of him by the law, although he may have stepped down from his pedestal for an interval. *Russ v. Railroad Co.*, 112 Mo. 45; *Dayharsh*

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v. Railroad Co., 130 Mo. 570; *Steube v. Iron Co.*, 85 Mo. App. (St. L.) 646. Dyson was Haworth's superior, and the superior of all the men in his crew. He was selected by the defendant company to direct the operation and movement of the car as well as to control the other work of the hands under him; he was in fact directing them, and the company is liable for his negligent act or omission while so doing."

In *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 292, the supreme court of Ohio said:

"The claim that Stone was a fellow-servant engaged in the same service with Kraft, is not supported by the proof. It is true that he was in the service of the same master, and engaged in the same general employment, but he was intrusted with duties and responsibilities of entirely a different nature, and wholly independent of those of Kraft. Occupying to the latter, the relation, substantially, of principal, he was in no just or proper sense a fellow-servant, nor engaged in what may properly be denominated a common service. The relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this court, and now firmly settled in the jurisprudence of the state, that where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury."

In *Bien v. St. Louis Transit Co.*, 108 Mo. App. 399, 412, 83 S. W. 986, the court said:

"The act of Dring which resulted in Bien's injury was not an act which it was Dring's duty manually to perform, but one which it was his duty to order. That is to say, it fell within the scope of his superintendency. The exact question then is, did performance of it by his own hand make him a fellow-servant? If it is to have a logical nature, the 'dual capacity' doctrine would seem to require that an employee who is regarded as both a fellow-servant and a vice-principal, should have duties assigned to him in each role. The doctrine ought not to take effect on the bare incident of a superintendent, *sua sponte* and momentarily, putting his hand to some chore. . . . If Dring, instead of running the car

out of the way himself, contrary to his duty and habit, had ordered another man to do it, the company's liability would be certain. Is it any less certain because Dring ran it; it being, as stated, a duty which properly he should have ordered instead of performing? Unquestionably not, according to the decisions in Missouri on identical facts."

See, also, *Russ v. Wabash Western R. Co.*, 112 Mo. 45, 20 S. W. 472; *Chicago etc. R. Co. v. Kimmell*, 221 Ill. 547, 77 N. E. 936.

It cannot be contended that Ward was not in charge of the men; that he did not control the car, its movements and speed; that he did not determine when it should be used, when it should start, what speed it should attain, or when and where it should stop. In the performance of these necessary duties he was a vice principal. It was under his direction that the car attained a reckless and dangerous rate of speed down grade and in the face of an approaching train, of which he had knowledge. Had he ordered one of the men to suddenly stop the car, without any warning to or knowledge of the others, his act would certainly have been that of a vice principal, and not that of a fellow servant. We fail to see that he changed his relation to the appellant or respondent by personally applying the brake instead of directing one of the men to do so. If he was not a vice principal in charge of the men and car, then they were without any vice principal in control as the representative of the master, a condition which could not be assumed to have existed and certainly ought not to have been tolerated. The former holdings of this court, made in kindred cases, are directly contrary to the position of appellant and the cases which it has cited. See, *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Nelson v. Willey S. S. & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Woods v. Globe Nav. Co.*, 40 Wash. 376, 82 Pac. 401; *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Comrade v. Atlas Lumber & Shingle Co.*, 44 Wash. 470, 87 Pac. 517.

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In the case last mentioned, an engineer, without giving the usual warning, started the machinery in a sawmill, while the plaintiff, a saw filer who was performing his duties, was in a dangerous position. It was contended that the negligence of the engineer was that of a fellow servant, but this court said:

"It was customary for the appellant, by its engineer, to give a signal by two blasts of a steam whistle shortly before starting the mill, and in fact it was its duty to give some such warning so that its employees might remove themselves from positions of danger in which they might happen to be placed. In giving this warning, the engineer was performing a nondelegable duty of the master, thus discharging the duties of its vice principal. This being true, his negligence was that of the master."

Appellant also cites *Grim v. Olympia L. & P. Co.*, 42 Wash. 119, 84 Pac. 635, in support of his contention that Ward and the respondent were fellow servants. The facts in that case are not at all similar to those now under consideration. There, two motormen were coemployees without authority the one over the other, although they were expected to consult together; while here, Ward had undoubted authority, superintendence and control over the respondent Tills. It could not be reasonably contended that Tills had any connective or controlling influence over Ward, arising out of consociation of duties. He was completely under Ward's commands, and it is not at all doubtful that any attempt on his part to assume control over Ward or give him directions would have resulted in loss of employment, a result not possible in the *Grim* case. After a careful examination of all instructions, both those requested and those refused, upon which the appellant has predicated its assignments of error, we hold that those given correctly stated the law applicable to the pleadings and evidence, and that no error was committed in the refusal of those requested.

The jury returned a verdict for \$26,985 damages. Upon the hearing of appellant's motion for a new trial, the trial

court required the respondent to remit \$6,985 thereof, or submit to a new trial. This remission being made, final judgment was entered for \$20,000. The appellant now contends that the judgment is still excessive, that it should not be permitted to stand, and that this court should now grant a new trial by reason of excessive damages awarded under the influence of passion and prejudice. The undisputed evidence shows that the respondent was forty-three years of age, in good health, earning \$2.25 per day; that he was most seriously injured; that the loaded car ran over him, dislocating a vertebra; that he is paralyzed from his hips downward; that he has completely lost control of his bowels, urinary and other organs; that he has been confined to his bed since the accident, and will be during the remainder of his life; that he has sustained other injuries; that he has suffered and will continue to suffer intensely; that his condition is such as to require the constant attendance of a nurse and the frequent services of a physician; and that, although he is in this unfortunate condition, he may live the expected period for a man of his age. He is absolutely helpless, and it is difficult to understand how he could be more seriously injured and continue to live. There is no dispute of the evidence of the respondent and his physician as to the nature or extent of his injuries. Bearing in mind the fact that the trial court has already made a reduction of \$6,985, we do not feel justified in disturbing the judgment or holding it excessive.

The appellant has also based an assignment of error upon the refusal of the trial court to grant it a continuance, upon its motion made at the opening of the trial, and supported by affidavits. We have carefully examined the motion and affidavits, but fail to find that the court abused its discretion or committed any error in this regard. The judgment is affirmed.

HADLEY, C. J., DUNBAR, RUDKIN, and FULLERTON, JJ., concur.

MOUNT and ROOT, JJ., took no part.

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Opinion Per DUNBAR, J.

[No. 7308. Decided October 14, 1908.]

W. A. FINN, *Respondent*, v. C. W. YOUNG, *Appellant*.¹

PARTNERSHIP—SALE OF BUSINESS—REMEDIES BETWEEN PARTNERS—FRAUD OF PARTNER—MEASURE OF DAMAGES. Where a partnership business was sold by one of two equal partners, who fraudulently secured his copartner's consent to the sale and misrepresented the price actually received, the measure of plaintiff's damages is the difference between the sum received by plaintiff from defendant and one-half of what the purchaser paid, even if the sum paid exceeded the actual value; since a fiduciary relation existed between the partners and plaintiff was entitled to his share of any profit made.

PARTNERSHIP—ACTIONS BETWEEN PARTNERS—FRAUD. It is no answer to an action between partners to recover damages for fraudulent representations in the sale of the business that there should be an accounting and a reinstatement in the business, when the fraud was not discovered in time to gain relief in such an action.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 3, 1907, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action in tort. Affirmed.²

Peters & Powell, for appellant.

W. E. Crews and *J. R. Poland*, for respondent.

DUNBAR, J.—This action was brought by the plaintiff W. A. Finn against the defendant C. W. Young. The plaintiff alleges, in substance, that he and the defendant were copartners, doing business in Shakan, Alaska; that, during the time the partnership existed, he was at Shakan attending to the business there, and defendant was attending to the business matters at other places; that, during the time the partnership existed, he executed an optional agreement with one

¹Reported in 97 Pac. 741.

²NOTE.—For decision on former appeal, see *Finn v. Young*, 46 Wash. 74, 89 Pac. 400. REP.

Carroll, subject to the confirmation of the defendant, for the sale of the property, \$20,000 for the location, and invoice price for the logs and lumber and merchandise; that Carroll took that optional agreement to Seattle, and subsequently notified him that the agreement was not confirmed by the defendant; that subsequent to that time, and without his knowledge of the facts, the defendant, with the intent and purpose of cheating and defrauding him, wrongfully and fraudulently executed an agreement with Carroll for the purchase of the property, whereby Carroll agreed to pay the sum of \$35,000 for the property; that, after the defendant entered into that optional agreement with Carroll he wrongfully and fraudulently concealed the fact from him that he had entered into such an agreement, and that he wrongfully and fraudulently informed him that the agreement with Carroll for the purchase of the property was the same that had been entered into or had been first given, except that the time for the option had been extended to ninety instead of sixty days; that the defendant wrongfully concealed the fact from him that he had executed an optional agreement with the purchaser Carroll for a price largely in excess of the first optional agreement; that he went to Shakan, Alaska, and informed him that the agreement was for the same amount, and that it was his opinion that Carroll would not take up the agreement; represented to him that he had knowledge and information from Carroll that he would not take up the agreement and consummate the sale, and wrongfully concealed the amount of the second optional agreement from the plaintiff in the case. These allegations of fraud upon the part of the defendant are all denied by the answer. Upon these issues, the case went to trial, and the jury returned a verdict for the plaintiff in the sum of \$7,000. There were some other allegations in the complaint in relation to other claims against defendant, but they seem to have dropped out of the case and are not pertinent issues here. Judgment was rendered for \$7,000, and appeal followed.

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There are three assignments of error, but they all really hinge upon the first assignment, viz., this charge or instruction to the jury:

"I charge you, gentlemen, that the measure of damages in this case, in case you find for the plaintiff, is the difference between the amount Finn received from Young and one-half of what Carroll paid for the property."

This the appellant objects to as not being the proper measure of damages, but insists that the true rule of damages is the difference between the actual value of Finn's half interest and its value under the facts as represented; and an extended argument is made on this proposition, with the citation of many authorities. It seems to us that the controversy which appellant raises is one over terms and definitions rather than the application of any legal principle, and that when the court charged the jury that "the measure of damages in this case . . . is the difference between the amount Finn received from Young and one-half of what Carroll paid for the property," he did in effect instruct them that the measure of damages was the difference between the actual value and the value under the facts represented; for the actual value was the market value as indicated by the sale to Carroll, and its value, under the facts represented, was what plaintiff received from defendant for it.

If A. and B. own a horse which is actually worth \$200 in the market, and which unknown to A. has been sold by B. for \$200, and B. fraudulently represents to A. that the horse is worth only \$100 and fraudulently prevails upon A. to sell him the horse for \$100; the result is that A. receives \$50 for his share in the horse; whereas, had it not been for the fraud perpetrated upon him, he would have received \$100. In other words, he loses or is damaged \$50, and \$50 represents the difference between the amount he received from B. and the amount that B. received for a half interest in the horse; or stated differently, it represents the difference between the actual value and the represented value.

That is exactly the case here, for after any amount of talk and argument has been indulged in, the obvious fact remains that, if the fraud had not been perpetrated upon the respondent, instead of receiving \$10,500 for his half interest in the business, he would have received one-half of the \$35,000 or \$17,500. His damage then by reason of the fraud was \$7,000, the amount found by the jury. Even if it did not conclusively appear that \$35,000 was the actual value, a fiduciary relation existed between the respondent and appellant, and the respondent was entitled to any profit that might be made by reason of the sale. The fact that appellant offered to give the respondent \$500 if Carroll returned to take up the option, does not help the appellant, in our estimation. From the testimony it is easy to gather that this offer was made for the purpose of consummating the fraud by convincing the respondent that he had no hope that Carroll would "show up," as he termed it.

Some suggestion is made by appellant that there should have been an action for accounting and for a reinstating of respondent in the business. But no issue of this kind is raised in the pleadings, and it would have been impossible under the circumstances, as the fraud was not discovered in time to give relief in such a form of action. Affirmed.

HADLEY, C. J., RUDKIN, MOUNT, and ROOT, JJ., concur.

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[No. 7317. Decided October 14, 1908.]

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY,

. Respondent, v. I. J. BALLINGER *et al.*, Appellants.¹

VENDOR AND PURCHASER — CONTRACTS — OPTIONS — ACCEPTANCE — FAILURE TO EXERCISE OPTION. An option agreement for a railroad right of way, whereby the owners agree to convey the right of way within six months upon payment of \$900, and wherein it is stipulated that if the company fail to exercise the option within the time specified the agreement shall be null and void, is not changed into a contract binding upon both parties, in which time would not be of the essence, by a written letter of acceptance stating that the payment agreed upon would be made; but time is of the essence, and if tender is not made within the time fixed the contract is at an end.

SAME — PERFORMANCE — WAIVER — ESTOPPEL. The fact that the vendors in an option agreement for a railroad right of way allowed the company to go on the premises and make improvements during the period of the option, does not estop them from insisting upon a strict performance of the agreement, and in refusing to make a conveyance where tender of the price was not made within the time specified.

Appeal from a judgment of the superior court for Spokane county; Poindexter, J., entered December 9, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action for specific performance. Reversed.

Merritt, Oswald & Merritt, for appellants.

Cannon & Lee, for respondent.

DUNBAR, J.—This is an action to compel specific performance of an agreement for the sale and purchase of a railroad right of way, entered into by appellants and respondent. The agreement consists of a right of way option and letter of acceptance. The right of way agreement was as follows:

“In consideration of the sum of one dollar to us in hand paid, the receipt of which is hereby acknowledged, and the

¹Reported in 97 Pac. 739.

further sum of eight hundred ninety-nine and no-100 dollars, to be paid on the execution of the deed hereinafter mentioned, we have agreed, and by these presents do agree, on written request, within six months from date, to sell and convey to the Portland and Seattle Railway Company, a Washington corporation, free and clear of all encumbrances, a right of way for its road over and across [here follows description], and upon payment of said sum of nine hundred dollars (\$900), we agree to make a good and sufficient deed to said company for said right of way, the company to have the right to enter and construct its road across said premises in the meantime. (Should the said company fail to exercise this option to purchase said right of way within six (6) months from the date hereof, then this agreement to be null and void.) Said company to provide one surface crossing and one 6-foot arch for the passage of stock under the track of said road, this agreement as to the arch subject to a division engineer's approval.

"In Witness Whereof, we have hereunto subscribed our names this 26th day of December, 1906.

In the presence of
Geo. I. Hinckley.

I. J. Ballinger.
Elizabeth Ballinger."

This right of way agreement was entered into on the 26th day of December, 1906. On the 4th day of January, 1907, the respondent sent to the appellants what it terms its acceptance of the option, which was as follows:

"Spokane, Washington, January 4, 1907.

"I. J. Ballinger, Esq., and Elizabeth Ballinger,

"Cheney, Washington.

"Dear Sir and Madam: Referring to right-of-way agreement made with each of you on December 28th, 1906, by which you agree to convey to Portland and Seattle Railway Company a right of way over the west half of the northwest quarter of section ten, the east half of the northeast quarter of section nine, twenty-two, forty-one.

"On behalf of the Portland and Seattle Railway Company, I beg to advise you that the same is hereby accepted and we will be prepared to make payment agreed and take title to the right of way strip. Yours truly, W. C. Sampson, Right of Way Agent."

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Upon failure to pay the amount of money stipulated, the appellants notified the respondent that it (the respondent) had no interest in the land, and demanded possession of the same. The respondent entered into the possession of the land and expended a large amount of money in constructing the road. After the notification to respondent by the appellants that it had no further interest in the land, the respondent tendered to the appellants the stipulated price for the land and demanded a deed, which was refused. This action was commenced in August, 1907, by the respondent, to procure a restraining order, by which appellants were restrained from interfering with respondent's possession of said real estate and constructing a railroad thereon. The trial court found, among other things, the agreements as set forth above; that time was not of the essence of the contract for the purchase and sale of said lands; and that respondent was entitled to the exclusive possession of said right of way strip, and to a specific performance of the contract. Judgment was entered in accordance with these findings, and appeal followed.

The trial court evidently based its judgment on the assumption that the acceptance of the option by the respondent changed the transaction between the parties from an option to an agreement to sell, binding upon both parties to the agreement and enforceable by either, and that this acceptance by the respondent destroyed and annulled the conditions of the option contract; else it could not have found that the payment of the purchase price was not a condition precedent, and that time was not of the essence of the contract. In this we think the court erred. An option is a common and familiar method of securing the right to buy land, the purchaser paying a certain amount with the privilege of forfeiting that amount if he does not see fit to pay the full purchase price agreed upon on or before a stipulated time. The conditions are plain and easily understood. If the purchase price is paid or tendered within the time specified, the obligation of the vendor is to give a deed. If it is not, no obligation whatever

rests upon him. The limitation has been fixed by the parties and it is as binding as any statutory limitation.

It is difficult to see how the plain provisions of this option contract could be annulled by the announcement by the respondent that the agreement was accepted. Most certainly it was accepted when the one dollar consideration was paid and the agreement to sell upon certain conditions was executed by the appellants. Can it be that the mere notification of acceptance stripped away all the appellants' rights under the contract, and left them nothing in return? The contract specially provides that, should the said company fail to exercise the option to purchase the right of way within six months, the agreement should be null and void. This certainly made time the essence of the contract, if time can be made the essence of a contract. Now, what is meant by the words "fail to exercise," etc? This question is answered by the respondent in its note of acceptance, viz., that it would be prepared to make the payment agreed and take title. There is nothing to indicate that it would accept some of the conditions of the option contract and abrogate others; but it accepted them all. It seems to us that this letter of acceptance neither added to, nor took away, anything from the contract, and was certainly entirely useless. But if it was necessary, by its reference to the contract and its acceptance of the conditions therein expressed, it must be held to have accepted all the conditions of the contract, and that is all there is in this case. The respondent entered into an option agreement to pay a particular price at a definite time, and it allowed the time to expire. The appellants' contention is plainly sustained by the authorities cited, viz: *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131; *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; *Lockman v. Anderson*, 116 Iowa 236, 89 N. W. 1072; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; and many other cases. The respondent attempts to distinguish these cases, but in this we think it is unsuccessful; for while in some of the cases the circumstances

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were of necessity different, the principles announced sustain the appellants' right to forfeiture.

Great stress is placed upon the fact that appellants suffered the respondent to enter into possession of the land and to expend a large amount of money thereon, and it is claimed that, for this reason, they should be estopped from demanding a strict compliance with their contract. If we have placed a proper construction upon the contract, it follows that the respondent went upon this land and made expenditures at its own peril. This may be a hardship, but it is always a hardship for a person purchasing an option to lose the payment when the option expires. Sometimes the amount paid for the option is small and sometimes it is large, but this is only a matter of degree; the legal consequences are always the same. Possession can in no way change the conditions of the contract in reference to the time of payment. That was a matter which was fixed by the contract. If, as a matter of accommodation to the respondent, the appellants allowed it to take possession of the land, they should not now be deprived of any right they have under the contract. We think there is no element of estoppel shown anywhere in the record, and neither are we able to discern any special hardship in the case. The respondent need not lose its expenditures, but failing to perform the conditions of the contract it must be relegated to the exercise of the right of eminent domain, if it desires the possession of the land.

The judgment will be reversed, and the action dismissed, with costs to the appellants.

FULLERTON, CROW, ROOT, and RUDKIN, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7214. Decided October 15, 1908.]

EDWARD R. SUTHERLAND, *Respondent*, v. W. H. PALLISTER,
Appellant.¹

BILLS AND NOTES—PAYMENT—EVIDENCE—SUFFICIENCY. Where a note was given to a real estate agency for earnest money advanced on behalf of the maker, a prospective purchaser of real estate, who afterwards procured another to take the contract off his hands, and the deal was finally closed and the new purchaser returned to the agency the money for which the note was given, the note was thereby paid.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 23, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action upon a promissory note. Reversed.

Frank C. Park, for appellant.

Alexander & Bundy, for respondent.

DUNBAR, J.—This action is brought upon a promissory note, given by the defendant to the Crane Realty Company, of Seattle, for the sum of \$500, due forty days after date, viz., January 7, 1907. The plaintiff is the assignee of said note. The answer admitted the execution of the note, denied ownership in the plaintiff, and alleged that said note was transferred to plaintiff for the purpose of cheating and defrauding defendant; that said note was given as earnest money upon the purchase of certain real estate, for which the Crane Realty Company was the agent and of which, with defendant, it was purchaser; that thereafter such real estate was sold by said Crane Realty Company and the defendant, and that there then became due to the defendant the sum of \$2,500, together with the promissory note sued upon; and that it was then and there agreed that such note should be

¹Reported in 97 Pac. 745.

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turned over and cancelled and that \$2,500 in cash would be paid to defendant; alleges that plaintiff, knowing such facts, conspired with the Crane Realty Company to cheat and defraud defendant; and prayed for the delivery of and cancellation of said note and for costs. The reply denied the affirmative allegations of the answer. The cause was tried to the court, and judgment was rendered in favor of plaintiff for the price of the note, with accrued interest.

It appears from the undisputed testimony that the Crane Realty Company was offered a piece of real estate for \$70,000; \$2,000 as an option was to be paid in cash, and \$18,000 in ten days, and it was to receive a commission of \$2,000 for effecting the sale. It formed a syndicate to take the option on the property, and induced the defendant to take a one-fourth interest. The defendant not having the cash at hand, the realty company advanced his share of the option money, viz., \$500, and it was for this money that the note sued on was given. When the next payment came due, the defendant was not ready to furnish his share of the money, and in order, as he testifies, to prevent a loss of the bonus, he procured one Max Ragley to take his part of the contract off his hands. Ragley and his company eventually took up the whole option and bought the whole property, and no forfeiture was ever declared. While there is much conflict in the testimony, it appears plainly, from the testimony of the respondent and the officers of the Crane Realty Company, that the latter received from the new company the money which it had paid for appellant, the money for which the note was executed. Mr. Cutler, one of the officers of the company, after some evasion, finally testified in so many words that the company got back the \$500 which it had advanced as earnest money for appellant. It seems to us that this is all there is to the case, and that the money for which the note was given having been returned to the realty company, it could not collect it a second time.

The judgment is reversed, with instructions to adjudge costs to appellant.

HADLEY, C. J., RUDKIN, CROW, and FULLERTON, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 7202. Decided October 15, 1908.]

THE CITY OF SPOKANE, *Appellant*, v. R. O. CAMP,
Respondent.¹

LIVERY STABLE KEEPERS—RESTRICTIONS—CONSENT OF PROPERTY OWNERS—ORDINANCE—DEFINITENESS. An ordinance prohibiting the keeping of a livery stable in any block in which two-thirds of the buildings are residences, "within two hundred feet of any such residence on either side of the street," unless owners of a majority of the lots "in such block" consent, is not void for indefiniteness as to the blocks to be considered in determining the number of the residences; as it is clear that consent is to be obtained of the owners of the block in which the stable is to be located.

SAME—VALIDITY—MUNICIPAL CORPORATIONS—ORDINANCES—DELEGATION OF LEGISLATIVE POWERS. An ordinance prohibiting the keeping of a livery stable in a block in which two-thirds of the buildings are used for residence purposes, unless the owners of a majority of the lots in such block consent thereto, is not an unlawful delegation of the legislative powers of the city council.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered August 26, 1907, upon appeal from a municipal court, dismissing a prosecution for the violation of an ordinance restricting the keeping of livery stables. Reversed.

L. R. Hamblen, F. D. Allen, and Harry A. Rhodes, for appellant, cited: *Leger v. Rice*, Fed. Cas. No. 8,210; *Robinson v. Bidwell*, 22 Cal. 379; *Guild v. Chicago*, 82 Ill. 472; *Lytle v. May*, 49 Iowa 224; *Clarke v. Rogers*, 81 Ky. 43; *Wales v.*

¹Reported in 97 Pac. 770.

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Citations of Counsel.

Belcher, 3 Pick. 508; *State v. Pond*, 98 Mo. 606, 6 S. W. 469; *State v. Noyes*, 30 N. H. 279; *State v. Board of Chosen Freeholders*, 51 N. J. L. 454, 18 Atl. 117; *Grant v. Courter*, 24 Barb. 232; *Smith v. McCarthy*, 56 Pa. St. 359; *State v. Copeland*, 3 R. I. 33; *Louisville & N. R. Co. v. County Court of Davidson*, 33 Tenn. 637, 62 Am. Dec. 424; *State v. Parker*, 26 Vt. 357; *Rutter & Co. v. Sullivan*, 25 W. Va. 427; *Smith v. Janesville*, 26 Wis. 291; *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *Haney v. Commissioners of Bartow County*, 91 Ga. 770, 18 S. E. 28; *State v. New Haven & N. Co.*, 43 Conn. 351; *Meyers v. Baker*, 120 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580; *Walton v. Greenwood*, 60 Me. 356; *In re Thirty-fourth St. R. Co.*, 102 N. Y. 343, 7 N. E. 172; *In re Flaherty*, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529; *State v. Barringer*, 110 N. C. 525, 14 S. E. 781; *Aurora v. United States*, 11 U. S. 382, 3 L. Ed. 378; *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782; *Ex parte McNulty*, 77 Cal. 164, 19 Pac. 237, 11 Am. St. 257; *Hildreth v. Crawford*, 65 Iowa 339, 21 N. W. 667; *Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 553, 53 Am. St. 325, 35 L. R. A. 84.

John M. Gleeson, for respondent, cited: *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *County of Los Angeles v. Hollywood Cemetery Ass'n*, 124 Cal. 344, 57 Pac. 153, 71 Am. St. 75; *In re Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. 310; *Smiley v. MacDonald*, 42 Neb. 5, 60 N. W. 355, 47 Am. St. 684, 27 L. R. A. 540; *State v. Tenant*, 110 N. C. 609, 14 S. E. 387, 28 Am. St. 715, 15 L. R. A. 423; *State v. Kuntz*, 47 La. Ann. 106, 16 South. 651; *Mayor of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *State ex rel. McMonies v. McMonies* (Neb.), 106 N. W. 454; *In re Hauck*, 70 Mich. 396, 38 N. W. 269; *Cantrel v. Sainer*, 59 Iowa 26, 12 N. W. 753; *Sioux Falls v. Kirby*, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621; *State v. Mahner*, 43 La. Ann. 496, 9 South. 480; *Ex parte Sing Lee*, 96

Cal. 354, 31 Pac. 245, 31 Am. St. 218, 24 L. R. A. 195; *Austin v. Murray*, 16 Pick. 121; *In re Quong Woo*, 13 Fed. 229; *McGregor v. Lovington*, 48 Ill. App. 211; *State v. Dubarry*, 44 La. Ann. 1117, 11 South. 718; *Day v. Green*, 4 Cush. 433; *State ex rel. Omaha Gas Co. v. Withnell* (Neb.), 110 N. W. 680, 8 L. R. A. (N. S.), 978; 21 Am. & Eng. Ency. Law (2d ed.), 992, 4 Supp. 302; McQuillin, Municipal Ordinances, §§ 86, 88, 415, 416; 2 Abbott, Municipal Corporations, pp. 1346, 1347, § 537; and the authorities cited therein in note 268, p. 1347; 25 Cyc. 1506.

DUNBAR, J.—The defendant, respondent on this appeal, was convicted before the municipal court of the city of Spokane for violating Ordinance No. A2919. Appeal was taken to the superior court of Spokane county; whereupon defendant moved to dismiss the cause and discharge the bondsmen and himself. This motion was granted by the court. Judgment of dismissal was entered, and the city appeals.

The sole question involved is the validity of the ordinance, it having been adjudged void and of no effect by the trial court. The ordinance is as follows:

"Section 1. It shall be unlawful for any person, firm or corporation to locate, build, construct or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes a livery, boarding or sale stable, or private stable where more than five head of stock are kept, within two hundred feet of any such residence on either side of the street, unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing to the location or construction of such livery, boarding or sale stable, or private stable where more than five head of stock are kept. Such written consent of the property owners shall be filed with the Board of Public Works before a permit shall be granted for the construction or keeping of such livery, boarding or sale stable, or private stable where more than five head of stock are kept.

"Section 2. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of

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a misdemeanor, and shall be fined in any sum not less than Fifty Dollars nor more than One Hundred Dollars.

"Section 3. This ordinance shall take effect and be in force ten days after its passage."

It is contended by the respondent that the ordinance is void for uncertainty, the language being so ambiguous that it cannot be ascertained how many blocks would have to be considered in determining the number of residences in a block. But it seems to us that this difficulty is more imaginary than real, and that there can be no doubt that consent must be obtained from the owners of the block in which the livery stable is actually located.

The other objections, with one exception, simply go to the policy of the ordinance, and embrace arguments which would more appropriately be addressed to the law making power. The exception mentioned above is that the ordinance constitutes a delegation of legislative power to the property owners of the city of Spokane, which is exclusively vested by law in the mayor and city council. This is really the important and vexatious question in the case—important because it involves a fundamental principle of government, and vexatious because there is a bewildering conflict of authority which it is impossible to reconcile, so that a review of the authorities would avail nothing.

Out of the wilderness of cases discussing this proposition, *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, and *State ex rel Omaha Gas Co. v. Withnell* (Neb.), 110 N. W. 680, are leading cases restricting the delegation of legislative powers; while *Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, *Davis v. Commonwealth*, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71, and *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603, lay down a rule which would sustain the ordinance in question. Indeed, *Chicago v. Stratton* was a livery stable case, and the ordinance sustained in that case was in all essentials similar to the ordinance assailed in this case. In that case the court held that the ordinance

did not delegate to a majority of the lot owners a right to pass upon the question presented, but that consent was in the nature of a condition subsequent which might defeat the operation of the prohibition against the location of a livery stable in a block where two-thirds of the buildings are devoted exclusively to residence purposes. The court stated in the course of its argument that, in a matter of purely local concern, the parties immediately interested may fairly be supposed to be more competent to judge of their needs than any central authority. In this case it may readily be seen that the council, recognizing the rights of the residents of the city to be consulted in matters purely local, matters affecting the comfort and even the health of the residents, and the right to have their will reflected in the enactments of their representatives, provided the ordinance for the purpose of meeting the desires of the residents in that regard. The ordinance is prohibitive, but leaves the right to the citizen to waive the prohibition if he chooses. Statutes of this character are common, and while it is generally conceded that the legislature cannot delegate its legislative function, it is well established that it may provide for the operation of a law which it enacts upon the happening of some future act or contingency. The local option laws in their various phases are common instances. While these laws were violently assailed, and in some instances received judicial condemnation, they are now almost universally sustained.

The ordinance in our judgment being a valid one, the judgment is reversed, and the cause remanded to the lower court with instructions to overrule the demurrer and motion interposed by the respondent, and to proceed with the trial of the cause in accordance with the opinion herein expressed.

HADLEY, C. J., CROW, MOUNT, and ROOT, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

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[No. 7149. Decided October 15, 1908.]

F. W. JOHNS, Respondent, v. S. A. ASH, Appellant.¹

DANGEROUS PREMISES—ACTIONS—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. There is sufficient evidence that the cause of plaintiff's injury was a cellar door, maintained by defendant between his two buildings and projecting over four feet into the street, where it appears that the distance between the two buildings was only twenty-three feet, that plaintiff left one of the buildings and had gone only a short distance when he fell on something and when he recovered he found himself lying on the cellar door, and other witnesses only a few feet distant heard the plaintiff cry out and found him injured on the door.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered October 28, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained through a fall on a cellar door. Affirmed.

Cain & Hurspool, for appellant.

W. B. Mitton and Brooks & Bartlett, for respondent.

DUNBAR, J.—The appellant owns and maintains two buildings in the town of Wallula, and owns the land on which the buildings are situated. There is a space of about twenty-three feet between the buildings. In this space the appellant maintains an outdoor cellar, with the door projecting into the street four feet and four inches beyond the property line. The cellar door slopes back from the street at an angle of five and one-half inches to the foot. The cellar door is about three and one-half feet wide. One of the appellant's buildings mentioned above is a restaurant; the other one, a candy store. On the evening of December 6, 1906, the respondent, who had taken his supper at the restaurant mentioned, started across the street, fell—he alleges—on the cellar door and was injured. Suit was brought for damages, and a judgment rendered for \$430. From this judgment

¹Reported in 97 Pac. 748.

this appeal is taken and raises only one question, viz., the sufficiency of the evidence to sustain the verdict.

It is the contention of the appellant that there is no definite testimony tending to prove that it was the cellar door which caused the respondent to fall, and that the jury had to indulge in guesswork to determine the cause of the injury. But we do not think this case falls within the reason of the rule announced by this court in many cases where it was decided that mere speculation and conjecture could not be accepted as legitimate testimony. It is true, the respondent does not swear, in so many words, that he stumbled over the cellar door, but he describes the course he was traveling, and the path in which the cellar was situated; he testifies that he struck something which threw his legs from under him and hurt him so badly that he screamed for help, and that when he recovered himself he was lying on what he presumed was the cellar door. Witness J. H. Scharry testified that he was walking a few steps ahead of respondent, heard somebody fall, and immediately heard respondent cry out that he was hurt; that he stepped back and found respondent injured on the cellar door. And to the same effect was the testimony of witness J. B. Reese. Considering the fact that these persons were all within a few feet of each other, and that it was only twenty-two feet between the restaurant and the candy store where the cellar is located, we think there is strong circumstantial evidence tending to show that the cellar door was the cause of the injury. And assuming the truth of all the evidence for the purpose of determining this question, and adding thereto every inference which the jury were warranted in drawing therefrom, we think the legal sufficiency of the evidence is abundantly established. The jury made special findings on all the material issues involved, and all in favor of the respondent.

Judgment affirmed.

RUDKIN, CROW, FULLERTON, and ROOT, JJ., concur.
HADLEY, C. J., and MOUNT, J., took no part.

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Opinion Per DUNBAR, J.

[No. 7273. Decided October 15, 1908.]

JOHN A. FALLDIN *et al.*, *Appellants*, v. THE CITY OF
SEATTLE, *Respondent*.¹

MUNICIPAL CORPORATIONS—NOTICE OF CLAIM—DEFECTIVE SIDEWALK—DESCRIPTION OF DEFECT—SUFFICIENCY. A claim against a city reasonably notifies the city of the nature of the defect and is therefore sufficient where it avers that the plaintiff, while passing along the sidewalk at the northwest corner of a specified street crossing, fell through said sidewalk into a hole thereunder, the walk at such place having been for a long time in a defective condition.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 10, 1908, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries. Reversed.

Douglas, Lane & Douglas, for appellants.

Scott Calhoun and *James E. Bradford*, for respondent.

DUNBAR, J.—This is an action for personal injuries. The complaint alleges the injury of the plaintiff Alma C. Falldin, by reason of falling through a sidewalk, which it alleged to be in a defective and neglected condition. The court held that the notice which was required to be given to the city did not sufficiently describe the defect in the sidewalk, and a demurrer was sustained to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. Judgment of dismissal was entered, and appeal from such followed.

The claim, omitting the formal parts, reads:

"On the evening of September 21, 1907, at about eight o'clock p. m., the undersigned, Alma C. Falldin, while passing along the sidewalk at the northwest corner of 28th avenue and East Union Street, in the city of Seattle, and in all things exercising due care on her part, fell through said sidewalk,

¹Reported in 97 Pac. 658.

owing to its defective condition, into a hole thereunder about seven or eight feet deep, and sustained severe and painful injuries; that the sidewalk at the place above named had been for a long period of time in a defective condition and such defective condition was known to the city."

This court has uniformly held that requirements of this kind must be reasonable, and that a reasonable compliance with such requirements was all that could be demanded; that the object of the notice was notice and nothing else; and that, when the city was reasonably notified of the place and the defect in the walk, such requirements were reasonably met. It is not necessary to review the cases. They all breathe this sentiment. Does this notice meet this requirement? We think it does, and that the respondent's contention that the notice only attempts to describe the hole under the sidewalk, and not the defect in the sidewalk itself, is too technical to meet the liberal spirit of our code in regard to pleadings: and no more technical rule should be applied to notices of this kind than to any other pleading. Hence, if a person of common understanding can tell from the notice what it meant, that is sufficient. Can it be presumed that the officers of the city, who must presumably have common understanding, did not understand from this notice that there was a defect in the sidewalk, and did not have their attention directed to such defect as well as to the hole under the walk? If from the notice it could possibly have been concluded, or even surmised, that the woman crawled under the sidewalk and fell into the hole, there might be some room for the contention that the defect in the sidewalk was not described. But when the notice says that, by reason of the defective condition of the sidewalk, she fell through said sidewalk into the hole beneath, it is difficult to comprehend how a person of common understanding could fail to conclude that there must have been an aperture or opening of some kind in the sidewalk large enough to allow her body to pass through it into the hole below; and if this be true, certainly a very palpable defect in the sidewalk

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itself was pointed out. We think the city was reasonably notified of the defect in the sidewalk, and that the court erred in sustaining a demurrer to the complaint.

The judgment will be reversed, with instructions to overrule the demurrer to the complaint.

HADLEY, C. J., RUDKIN, CROW, FULLERTON, MOUNT, and ROOT, JJ., concur.

[No. 7295. Decided October 15, 1908.]

MAY WHITEHOUSE *et al.*, *Appellants*, v. BRYANT LUMBER & SHINGLE MILL COMPANY, *Respondent*.¹

DEATH—BY WRONGFUL ACT—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. There is no sufficient evidence of the proximate cause of the death of plaintiff's decedent to warrant submitting the case to the jury, and a nonsuit is properly granted, where it appears that the deceased, a sawyer in a mill, was killed while all the other men were on the floor above changing the saws; that while there might be room for an inference that his head came in contact with a nearby unguarded Rosser saw, which was left in motion, there were no witnesses to the accident and no testimony to show in what manner he came in contact with the saw, whether in the line of his duty or performance of his work, or in some of the many ways for which the master would not be liable.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 4, 1907, upon granting a nonsuit at the close of plaintiff's case, in an action for the wrongful death of an employee in a mill. Affirmed.

Roberts & Hulbert and *O. M. Miller*, for appellants.

Graves, Palmer & Murphy and *Charles H. Winders*, for respondent.

DUNBAR, J.—This action is brought by the wife and surviving children of George H. Whitehouse, deceased, to recover damages from defendant for the alleged wrongful death of

¹Reported in 97 Pac. 751.

deceased. The complaint contains two general averments as a basis of the action for damages: (1) The failure of the defendant to guard a certain saw, in violation of the factory act, and (2) the employment of an incompetent servant to operate said saw. When the case was called for trial, on motion of defendant, the plaintiffs were compelled to elect upon which cause of action they should proceed, and they elected to proceed upon the cause of action based upon a violation of the factory act.

Plaintiffs' intestate was employed as head sawyer in defendant's mill, and had been so employed for a long time prior to the accident. The carriage way and the log deck were, in a general way, similar to such instruments or appliances in the ordinary mill. Suspended from the beams over the carriage way, and to the south and west of the sawyer's position, is a frame which contains what is called a "Rosser" saw, a saw used for barking or slabbing the logs before they are sawed, in order to rid the logs of all sand or gravel. This frame is raised or lowered by means of ropes attached. The Rosser saw has coarse, hooked teeth, and clears the log for the band saw. The band saw is eight or ten feet north of the position occupied by the Rosser saw, when operating upon the log.

At the time of the accident, the sawyer, the deceased Whitehouse, had directed the suspension of the operation of the machine for the purpose of putting on a sharp band saw, but at such times it was customary to leave the Rosser saw in motion, and it was left in motion at this time. Accordingly all the men working about the saw and carriage, including the Rosser saw man, by the sawyer's instruction went to the floor above for the purpose of letting down the sharp saw after the dull saw had been removed, the sawyer, the deceased Whitehouse, remaining below to loosen the clamp that held the dull saw and to reclamp the sharp saw when it was let down by the men above.

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After dropping the sharp saw down, the men above waited some ten minutes for some signal or direction from the sawyer below, when they received word that the sawyer was hurt. The sawyer was found, soon after the accident occurred, in an unconscious condition, and died in a short time without recovering consciousness. His skull was fractured, and the contention of the plaintiffs was that, in the performance of his duties, he had risen up and his head had come in contact with the jagged teeth of the Rosser saw, which was the cause of his death. No one saw the accident, but there was testimony to the effect that when he was found the Rosser saw was in motion and at a height which would permit it to strike a man in the top of the head, if he rose up under it. Portions of his hat, or of a hat similar to one which he wore, were also found scattered about the log deck, and there was medical testimony to the effect that the fractures of the skull could have been caused by coming in contact with the Rosser saw, or a saw of that character. At the conclusion of the plaintiffs' testimony, on motion of defendant's attorney, a nonsuit was granted, and the case dismissed. From a judgment of dismissal this appeal is taken.

It is not necessary to discuss the alleged error of the court in compelling appellants to elect under which cause of action they should proceed, or whether both allegations included one cause of action, for we are of the opinion that under the testimony the appellants could not recover in any case. For conceding, for the purpose of the case, that there was testimony upon which the jury might have been warranted in finding negligence on the part of the respondent, there is no testimony upon which a jury could have based a conclusion that such negligence was the proximate cause of the injury, not because there was no eyewitness to the accident, since it is undoubtedly the established law that the proximate cause may be shown by direct evidence or it may be adduced as an inference from other facts proven, but because no legitimate inference can be drawn that an accident happened in a certain

way by simply showing that it might have happened in that way, and without further showing that it could not reasonably have happened in any other way. Even if it be conceded that the decedent met his death by coming in contact with the Rosser saw—and it may be that there is room for such an inference under the testimony in the case—there is no testimony whatever tending to show in what manner he came in contact with the saw—whether it was in the line of his duty, whether it was necessary in the performance of his work to rise up under the saw, whether he pulled the saw down upon himself, whether he failed to take notice of an obvious peril, or whether the accident was caused by any one of the many conceivable ways which would not charge the master with liability. Without specially reviewing all the testimony in this case, we think it falls squarely within the rule announced in *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Olmstead v. Hastings Shingle Mfg. Co.*, 48 Wash. 675, 94 Pac. 474; *Peterson v. Union Iron Works*, 48 Wash. 505, 93 Pac. 1077; *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Stone v. Crewdson*, 44 Wash. 691, 87 Pac. 945.

The judgment will therefore be affirmed.

HADLEY, C. J., RUDKIN, CROW, and FULLERTON, JJ., concur.

MOUNT and ROOT, JJ., took no part.

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[No. 7078. Decided October 15, 1908.]

JOHN O. JOHNSON *et al.*, Respondents, v. NORTHPORT
SMELTING AND REFINING COMPANY, Appellant.¹

EVIDENCE—RESPONSIVENESS. Where plaintiff was asked to state what was the fact as to there being timber on land, claimed to have been damaged by fumes from a smelter, an answer that "it is all timber" need not be struck out as not responsive to the question, especially where the court directed further answer to the question.

APPEAL—HARMLESS ERROR—FACTS OTHERWISE ESTABLISHED. Where, in an answer to the question as to the kind of timber on plaintiff's land, he made a statement of the kinds, "and quite a bit of cedar too," it is not error to refuse to strike out the answer, the amount of cedar being subsequently shown.

TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE. An instruction to the jury based upon the contingency that they find damages to timber "by the noxious vapors arising from its smelter" is not unlawful comment on the evidence, it having been shown that the vapors or gases were destructive, since they were therefore noxious, and it is immaterial that they were so termed.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered April 2, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Affirmed.

C. S. Voorhees, Reese H. Voorhees, and F. Y. Wilson, for appellant.

Jesseph & Grinstead and Slater & Allen, for respondents.

DUNBAR, J.—This is an action against the appellant for the recovery of damages alleged to have been occasioned to the trees and timber growing upon the farm of the respondents, between the 5th day of August, 1903, and the 5th day of August, 1904. Upon issue being joined, a trial was had by jury, and a verdict was obtained by respondents for damages in the sum of \$770.65. Judgment was entered and appeal taken.

¹Reported in 97 Pac. 746.

It is first assigned that the court erred in denying the motion to strike out the following answer, given by respondent John O. Johnson: "Well, it is all timber," which answer was given in response to the following question: "What is the fact as to there being timber on your land?" This assignment is entirely without merit for, while the court did not sustain the motion to strike the answer as not being responsive to the question, it did so in fact by directing the witness to answer the question asked, which the witness did by replying: "There is timber on my land." In addition to this, the answer was natural enough, and not entirely irresponsive to the question asked, and there was no objection interposed to the question. It is evident that there could have been no misunderstanding by the jury as to what the witness meant, for he subsequently very candidly testified that, while it was originally all timber land, the timber had been cut off of twenty acres of it.

Again the witness was asked what kind of timber there was on the land, and he replied: "Well, there is pine and fir and some tamarack and quite a bit of cedar too." And the refusal of the court to strike the expression "quite a bit of cedar too," is assigned as error. In addition to the fact that the expression is too indefinite to be worthy of notice, the whole matter in relation to the amount of cedar was afterwards testified to by the respondent and others, and no possible harm could have come from the expression objected to. The other objections to the testimony are equally without merit.

Many of the instructions of the court are assigned as error, but we will only notice one, as the principal instruction can be sustained under the decision of this court in *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 92 Pac. 442. The one noticed above is the basis of this assignment, and is as follows:

"I further instruct you that if you should find from the evidence that any damage has been done to the timber grow-

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ing upon such lands of plaintiff by the noxious vapors and gases arising from its smelter at Northport, Washington," etc., etc.

This it is contended constitutes a comment on the testimony, in violation of art. 4 of the state constitution. *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098, is cited to sustain such contention. There this court said: "It is not the *quantum* of the particular comment, but all comment whatever, that is inhibited by the constitution." Abiding by that announcement, we still find the instruction not obnoxious to the constitutional inhibition, for there must be some comment. It would make no difference so far as the appellant's liability is concerned whether the gases were termed noxious or not; if they were gases which worked an injury to respondents' property, it would be liable for the damages done. This was the first time that the court in the course of a long instruction mentioned the word "noxious," but it had already properly instructed the jury that the appellant was liable for any damages done to respondents' property by reason of smoke, fumes, sulphur, or sulphurous acid and gases which it was shown appellant had discharged into the atmosphere and that had been borne by the winds to respondents' land. The respondents in their complaint did not even think it necessary to allege that the vapors and gases, which they alleged destroyed their property, were noxious; nor was it necessary. It was sufficient if such gases actually destroyed or damaged the property. In addition to this, when it is proven that the gases and vapors are poisonous and destructive, it is proven that they were noxious. Noxious means hurtful, harmful, injurious, destructive. Therefore the use of the word noxious added nothing whatever to the instruction. If it is the word "the" that is objected to, that is evidently a mere inadvertence, and it will not do to reverse judgments for an alleged prejudicial instruction, when the instruction as a whole plainly shows that no prejudice was suffered, even though there might have some small technical error.

Believing that the case was fairly tried, both with respect to the instructions and the admission of testimony, the judgment is affirmed.

HADLEY, C. J., CROW, MOUNT, and ROOT, JJ., concur.
FULLERTON and RUDKIN, JJ., took no part.

[No. 7304. Decided October 15, 1908.]

MARTIN JASPER, *Appellant*, v. BUNKER HILL & SULLIVAN
MINING & CONCENTRATING COMPANY, *Respondent*.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY. The plaintiff does not, as a matter of law, assume the risk from being entangled in rope, used by a foreman in attempting to replace a pulley on a line shaft while the machinery was running at full speed, where it appears from his testimony that the plaintiff was ordered to the place to assist the foreman, that he relied on the machinery being slowed down as was customary, that an unsafe frayed out rope that was dangerously long was used by the foreman without plaintiff's knowledge, and the evidence as to the powers of the foreman as a vice principal was conflicting; and it would be immaterial that a fellow servant selected the rope.

APPEAL—DECISION—REMAND. Upon the reversal of a judgment for failure to submit to the jury the questions of fact, a new trial must be ordered.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 3, 1907, in favor of the defendant by direction of the court, after a trial before a jury, in an action for injuries sustained by an employee. Reversed.

Robertson & Rosenhaupt, for appellant.

Myron A. Folsom, for respondent.

DUNBAR, J.—Plaintiff was employed, and had been for several years, as a jig tender in the defendant's concentrating plant at Kellogg, Idaho. A jig is a piece of machinery which

¹Reported in 97 Pac. 743.

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separates the ore from the quartz. The complaint alleges, that Knut Home was the defendant's general foreman, with full power of direction, etc; that on the 20th of April, 1905, while separating ore by use of these jigs—there being a great number in the mill—the belt, by reason of the negligent construction of said machinery, came off the line shaft pulley at jig No. 18; that the foreman directed plaintiff to take his place while the belt was on the local pulley at jig No. 18, and to hold the belt on to said pulley while he, the foreman, attempted to replace the belt upon the line shaft pulley, and, briefly, that he obeyed orders; that the foreman negligently used an old, frayed rope that was too long, and undertook to replace the belt while the machinery was running at full speed; that the rope became entangled in the belt and gearing, and catching the plaintiff's arm, caused him to be severely injured; and asked for judgment in the sum of \$4,000. The answer, in effect, denied that Home was a vice principal, but alleged that he was a mere night boss, and at the time a fellow servant; denied that the machinery or appliances were in any way defective, and pleaded assumption of risk by plaintiff. On the conclusion of all the testimony, the court took the case from the jury and entered judgment for defendant.

From the remarks of the court, made in disposing of the case, it is apparent that it acted on the assumption that the appellant had assumed the risk of the dangers of the situation. The pertinent testimony in this case is not very voluminous, and we have examined it carefully, and from such examination conclude that it was peculiarly a proper case for submission to a jury. Certainly if the testimony of the appellant was true, that he was ordered by the foreman to take the position that he did take, that he relied upon the foreman's ordering the machinery slowed down, as he testified was the custom, that an unsafe appliance, viz., a frayed out rope that was dangerously long, was used by the foreman without appellant knowing at the time what kind of a rope was being

used; it is difficult to see how the doctrine of assumption of risk can be applied. The testimony is absolutely conflicting as to the powers of the foreman, or night boss as he is termed by the respondent. If the testimony of the appellant is true, there is no question but that Home was a vice principal, although we are not prepared to say that the converse would be true, conceding the truthfulness of the testimony of the respondent. But in any event, it cannot be said that it was established as a matter of law that Home was not a vice principal. The same may be said as to the condition of the rope which was used. According to the testimony of the appellant, the rope was dangerously long and was frayed and raveled, making it liable to be caught by rapidly revolving machinery; while even according to the testimony of the respondent, the rope was at least susceptible of honest criticism. What we said in *Shea v. Seattle Lumber Co.*, 47 Wash. 70, 91 Pac. 623, applies with special force to this case. There the plaintiff was injured by reason of the breaking of a stick which he used in clearing out the saw, and it was said:

"It is elementary law that it is the duty of a master to provide his servant with reasonably safe machinery, tools, and appliances with which to perform the work required of him, and also to keep the same in reasonably safe condition. Whether the stick used met this requirement was a question of fact to be submitted to the jury."

It is respondent's contention, however, that the foreman did not select the rope, but that he sent one who it is claimed was a fellow servant to get the rope. Conceding this to be true, it was the foreman who actually used the rope, and it cannot be questioned that his was the duty of inspection. The same conflict appears in relation to the alleged direction given to the appellant by Home. On that subject the appellant testified: "He came to me and said: 'Martin, there is a belt off over yonder. I will go up and run it on, and I want you to hold it on that loose pulley,' and I says: 'All right, sir;'" while Home testifies that he gave appellant no

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orders whatever; that he had not spoken to him that evening, and that he did not know that he was assisting in any way in getting him the pulley. If this were true, and appellant was a mere volunteer or meddler, of course he cannot recover; but assuredly this is a question which must be determined by the jury. The same direct conflict of testimony is found in relation to the ordinary appliances used in other mills for replacing belts. And so, without further particularizing, every pertinent question tending to establish or disprove negligence on the part of the respondent or assumption of risk on the part of appellant, was met by a sharp conflict of testimony. The frank admission by the appellant that he had worked for several years as jig tender for respondent was about the only undisputed fact in the case, and this familiarity with the business, taken in consideration with the other facts, as claimed by the appellant, that he did not know the character of the rope which was used and that he relied upon the foreman slowing the machinery down, is not sufficient, we think, to establish assumption of risk as a matter of law.

It is urged by the respondent that, if this court finds error in the trial court to such an extent that the judgment will be reversed, the case should be submitted to the jury only as to the extent of damages. But were we to do this, we would commit the same error that the learned trial judge did, viz., a determination of questions of fact which can only be appropriately determined by the jury.

The judgment will therefore be reversed, and the cause remanded with instructions to grant a new trial.

HADLEY, C. J., CROW, MOUNT, and ROOT, JJ., concur.

FULLEERTON and RUDKIN, JJ., took no part.

[No. 7114. Decided October 15, 1908.]

H. M. LUND *et al.*, *Respondents*, v. IDAHO & WASHINGTON
NORTHERN RAILROAD, *Appellant*.¹

EMINENT DOMAIN—DAMAGE TO ABUTTING PROPERTY. The right of ingress or egress as to lots abutting on a street is property, and interference therewith by building a railroad in the street is damage, within the meaning of the constitution requiring that compensation be first made before taking or damaging property.

SAME—REMEDY OF OWNER—INJUNCTION—CONDITIONS ON GRANTING. Upon granting an injunction to restrain the operation of a railroad until damages to abutting property be first paid, the injunction should be held in abeyance for thirty days to allow condemnation proceedings to be commenced.

Appeal from a judgment of the superior court for Stevens county, Chapman, J., entered November 30, 1907, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action to enjoin the operation of a railroad. Affirmed.

Belden & Losey and Post, Avery & Higgins, for appellant.
Cannon & Lee, for respondents.

DUNBAR, J.—Among the material allegations of the complaint in this case, it is alleged that, on the 24th day of October, 1907, before daylight of said day, without the consent of plaintiffs or authority of them and against their wishes, the defendant entered upon Fourth street, in the city of Newport, directly in front of the premises owned by plaintiffs, and whereon they were then and for some years prior thereto had been conducting a retail hardware store; and that the defendant then built upon said street, and diagonally across the same, in front of plaintiffs' property, its main line of railroad; that no compensation had been paid to plaintiffs for damages sustained by reason of such building, and for

¹Reported in 97 Pac. 665.

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future operation of the railroad; alleges special damages by reason of the obstruction of the street and the prevention of travel thereon, and by reason of damage to plaintiffs' premises by smoke, steam, grease, cinders, noise, etc.

Defendant admitted the building of the railroad and its intention to operate the same as a steam railroad, but denied that plaintiffs would suffer any other damage than such as would be suffered by the public in general by the use of the street. Upon these issues, the cause went to trial, and the evidence showed that the market value of plaintiffs' premises was reduced to a material extent by reason of the construction and operation of this road; that the rental value was greatly reduced; and that the plaintiffs' business was damaged and practically made unprofitable by reason of the fact that the building of the road prevented safe ingress and egress to and from their place of business. The court, among others, made the following findings of fact: That plaintiff's premises, prior to the construction of defendant's road, was valuable as a retail business property, and was a desirable retail business location; that his hardware business was, and for many years had been, a profitable and lucrative business; that the defendant in the nighttime, without the consent and against the protest of the plaintiffs, entered upon the premises substantially as alleged in the complaint; that the said Fourth street had a width of seventy feet; that the said railroad, as so constructed, and the operation thereof in the usual manner of operating engines and cars over and upon the same, will materially interfere with the ingress to and egress from plaintiffs' said premises, and will cause smoke, cinders, and steam to fall upon plaintiffs' premises, and will otherwise cause injury and damage to plaintiffs' said business; that all said injuries so caused constitute special damages to plaintiffs' said property and plaintiffs' said business; and that the construction of the said railroad was with the permission of the city of Newport and authority theretofore granted by ordinance. As conclusions of law, the court found that the plain-

tiffs were entitled to an injunction restraining and enjoining the defendant from in any manner operating or running its engines, cars, trains, or other railroad equipment over and upon its said track in front of plaintiffs' said premises, or in any manner using said railroad at said point, until it shall first have paid to plaintiffs the amount of damage caused to plaintiffs' said property by reason of such construction and operation of the road.

Appellant excepted to the material findings of fact in relation to the respondents' damages, and insists that said findings are error. An examination of the record, however, convinces us that the findings are abundantly sustained by the testimony, and we shall therefore discuss the case from the standpoint made by these findings. Section 16, art. 1, of the state constitution, is as follows:

"No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner."

This language is so plain and unequivocal that to undertake to construe it would be like undertaking to demonstrate a self-evident proposition in geometry. It is terse, vigorous, plain, compact, and certain as to its meaning, and the only thing which will bear discussion in connection with it is, what is private property, what is a taking, and what is a damaging of private property. It has been the uniform holding of this court since the decision in the case of *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, that the right of ingress and egress, which the owner of lots abutting on a street had, was property, and that the interference with such right was a damage within the meaning of the constitutional provision. In commenting on *Moore v. Atlanta*, 70 Ga. 611, where the constitutional provision under consideration was similar to ours and where the injunction was denied, we said:

"A case has been brought to our notice which is exactly in point in its ruling, viz: *Moore v. City of Atlanta*, 70 Ga.

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611. The constitution of Georgia provides that private property shall not be taken or damaged without just and equitable compensation being first paid. The city of Atlanta was proceeding to grade a street in front of Moore's property, and he applied for an injunction to restrain the prosecution of the work until his damages should be assessed and paid. The writ was refused, and on appeal the supreme court affirmed the judgment. The decision of this case, as the reading of the opinion shows, was based on the argument that it was better that one man should be left to recover his damage by ordinary suit at law than the city authorities be hindered in grading the street; or, in other words, the damage to one man was balanced against the possible inconvenience of many, which is not a recognized basis of legal decision. The embarrassments of the constitutional provisions were pointed out, but it seems to us the plain letter of that instrument was disregarded. Justification for the decision was sought in the case of *Stetson v. Chicago etc. R. Co.*, 75 Ill. 74, but the fact seems to have been entirely overlooked that the constitution of Illinois does not require that compensation be first made in any such case. We can foresee many difficulties, and perhaps much litigation, likely to ensue from the faithful enforcement of our constitutional requirement that damages be first paid; but we have no choice in the matter, and these difficulties, as well as many others, must be met and dealt with as they arise."

This case was followed by *Hatch v. Tacoma, Oly. & G. H. R. Co.*, 6 Wash. 1, 32 Pac. 1063, where it was decided that the owner of property abutting on a street had the right to restrain the operation of a railroad in the street until damages were paid, on the theory that his right to the use of the street in front of his premises was a right distinguished from that of the general public and was properly subject to damages. We said in discussing that case:

"In any event, if the appellants' property has been damaged in a manner different from that of the public generally by the appropriation of the street for railroad purposes, they are entitled to compensation; and damages, to be recoverable, are not confined to the land itself, but may only [also] affect

that which is incident thereto, and necessary to the use thereof. The owner of a lot on a street in a city has a right to the use of the adjoining street which is distinct from that of the public, and such right is as much property as the lot itself; and cannot be taken away or injuriously affected, without compensation."

This court has never wavered in its adherence to the general principles announced in these two cases, but has substantially reaffirmed the doctrines therein announced in *Patton v. Olympia Door & Lumber Co.*, 15 Wash. 210, 46 Pac. 237; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90; *State ex rel. Smith v. Superior Court King County*, 26 Wash. 278, 66 Pac. 385; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201; *Stone v. Seattle*, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253.

The learned counsel for appellant attempts, but we think unsuccessfully, to distinguish these cases. While, of course, the situation in each case was somewhat different from the others, in all of them the court adhered to the main principle that the abutting property owner had an interest in the street in addition to the general interest of the public, and that these interests or easements constituted private property which could not be damaged without compensation first having been made. The right to an injunction was also determined in many of the cases cited. Applying the rule of the cases cited to the facts in this case, where it appears that the operation of the road will materially interfere with ingress and egress to and from respondents' premises, and that by reason of damage done to the respondents' property the market and retail value of the premises is materially diminished and respondents' business rendered less profitable, the respondents are entitled to the relief granted by the trial court.

The appellant seems to rely largely on the case of *Smith v. St. Paul, Minn. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889, and quotes extensively from the opinion in that case. That case in no particular overrules the principle

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announced in *Brown v. Seattle*, or *Hatch v. Tacoma, Oly. & G. H. R. Co.*, but on the contrary approves both cases. In the judgment of the writer of this opinion, the word "physical" was given undue prominence in the opinion of that case, and has led to some confusion, for it is a little difficult to understand how the act of ejecting smoke, gases, fumes, and odors into the dwelling house of another can consistently escape the imputation of a physical invasion. But, as showing that the case is in no wise controlling here, we quote from the opinion at some length:

"The jarring of the earth of respondents' lots and the casting of soot and cinders thereupon, and the emission of smoke physically injuring property are injurious physical effects to the *corpus* of respondents' property, which, we think, come within the scope of the term 'damaged,' as used in the constitutional provision. If a railroad company cannot carry on its business upon its own property without necessarily disturbing the physical conditions of other property, it is evident that such company has not acquired sufficient property for the conduct of its business, and it should be required to pay such damages as the actual physical disturbance of the neighboring property entails thereupon."

Thus it will be seen that the questions involved in this case were not considered in that case, and that there was no attempt to overrule or modify the doctrines of *Brown v. Seattle* or *Hatch v. Tacoma, Oly. & G. H. R. Co.* In view of the many and uniform decisions of this court on the determinative questions involved, we do not feel called upon to enter again into a review of the cases decided in other jurisdictions.

The judgment will be affirmed, but the injunction will be held in abeyance for the period of thirty days from the date this opinion is filed to allow appellant to commence condemnation proceedings. If such proceedings are not commenced within that time, the injunction will be enforced.

HADLEY, C. J., CROW, MOUNT, and ROOT, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

[No. 7225. Decided October 15, 1908.]

NORTHERN PACIFIC RAILWAY COMPANY *et al*, *Appellants*, v.
THE CITY OF GEORGETOWN, *Respondent*.¹

EMINENT DOMAIN—DECREE—AWARD OF DAMAGES—ABANDONMENT OF PROCEEDINGS—EFFECT—BAR—ESTOPPEL. Where proceedings to condemn a street across railroad rights of way and tracks resulted in an award of \$12,000 in favor of the defendants, and the city elected to abandon the proceeding and repealed the ordinance therefor, the judgment is a bar to a subsequent proceeding brought shortly after to condemn a street across the rights of way six inches south of the former location, where the same was brought for the purpose of evading the prior award, and in the hope of getting a lower verdict (FULLERTON, J., dissenting).

Appeal by defendant from a judgment of the superior court for King county, Tallman, J., entered November 16, 1907, upon the verdict of a jury, rendered for nominal damages by direction of the court, in condemnation proceedings. Reversed.

Carrol B. Graves, for appellants.

I. H. Randolph and Todd, Wilson & Thorgrimson, for respondent.

DUNBAR, J.—As the statement in appellants' brief seems to be in exact accordance with the record, we will adopt it as the statement of the case. The community known as Georgetown has grown up on both sides of the railroad rights of way of the two appellants, and the territory thus occupied has been incorporated as the city of Georgetown, a city of the third class. The railroad rights of way run at this point in a northwesterly and southeasterly direction, the business district and some of the residence district being to the southwest and the exclusively residence district to the north and east of these rights of way, at or near the point where the

¹Reported in 97 Pac. 659.

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proposed street is located. In going south upon the west side of the said rights of way, Valley street, now known as Rainier avenue, parallels the rights of way until nearly opposite the proposed street extension, when it turns at a right angle and runs easterly to the rights of way and then runs south parallel with said rights of way. On the east side of the rights of way, such streets as Nora Avenue and Sander avenue run in a northerly and southerly direction, but are not extended so as to intersect the railroad rights of way, and in order for either street to make such intersection, near the point of the proposed street crossing, Nora avenue must be extended in a general southerly direction and then turned in a westerly course, while at Sander avenue the extension must be made in a westerly course from its west marginal line.

In the winter and spring of 1905, the city of Georgetown, by ordinance and by proceedings commenced, undertook to lay out and extend Nora avenue down and across the railroad rights of way of appellants, and across the adjacent lands. Such proceedings were had in the Nora avenue extension that a judgment of condemnation was entered, trial was had upon the award of damages, and final judgment entered in favor of the Northern Pacific Railway Company for the sum of \$12,000, and in favor of the Columbia and Puget Sound Railroad Company in the sum of \$4,000. This judgment was entered November 20, 1905. Subsequent to such judgment and prior to the commencement of the present proceedings, the city council of Georgetown resolved to abandon the proceedings and repeal the ordinance providing for the laying out of the Nora avenue extension.

On June 11, 1906, the city council of Georgetown provided by ordinance for the extension of Sander avenue, and for the necessary condemnation proceedings. On October 12, 1906, judgment was rendered adjudicating a public use of this proposed improvement, and thereafter on the 7th day of November, 1907, a hearing as to the amount of damages

to be awarded to the Northern Pacific Railway Company and the Columbia and Puget Sound Railroad Company, on account of the crossing of their rights of way by this street, was had, all evidence offered by appellants was excluded, and the jury was instructed by the court to return verdicts for nominal damages. Such verdicts were returned by the jury, and judgment was finally entered upon such verdicts. From such judgment this appeal is taken.

The plat and testimony show that the extension of Sander avenue is located across the rights of way just six inches south of the location of the Nora avenue extension. Appellants' assignment, that the court erred in adjudicating that the improvement proposed was a public use, it will not be necessary to discuss in this opinion. The second assignment is that the court erred in refusing to hold and find that, by the judgment in the Nora avenue proceedings, the city was barred from maintaining the proceedings, these proceedings being for the same project as the prior proceedings, and for the purpose of avoiding the judgment in the prior proceedings. With the view we take of this error, it will not be necessary to discuss the subsequent errors assigned.

The testimony in the case and the maps on file show beyond a reasonable doubt, if not conclusively, that the object of the city in abandoning the Nora avenue extension proceedings and commencing the Sander avenue extension proceedings was simply and exclusively for the purpose of avoiding the award in the first trial, and to obtain a new trial on substantially the same proposition, viz., of connecting by a highway the two districts of the city now separated by the railroad tracks and rights of way, and therefore it would not only be subversive of justice, but would be making a farce of judicial proceedings to allow a litigant to play hide and seek with the judgments of a court by accepting such judgment if it suited him, by rejecting it if it did not, and commencing another action involving the same issues, and so on *ad infinitum*, until

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he was satisfied with the result. The law abhors a multiplicity of suits, and will compel the trial of all the issues in one case to prevent the multiplicity. How much more abhorrent the retrial of the same issues in different suits. The law accords to every person, natural or artificial, one fair trial and one only. What would be thought of the attempt of a railroad company to abandon a condemnation proceeding through a citizen's farm because the award was large, and commence another condemnation proceeding with the boundary line of the second six inches from the boundary line of the first? Such proceeding would not be tolerated for a moment, and for the reason that the law is no respecter of persons, it should not be tolerated when the railroad company's property is sought to be appropriated. The city engineer testified that he had consulted with the council about the question, and frankly admitted that the object of the abandonment of the first suit and the commencement of this suit was to get a cheaper proposition. The following is an excerpt from his testimony:

"Q. I will ask you this: Did you ever have any talks with the city council about this; consult with the mayor or city council about this extension? A. I have, sir. Q. Did you consult with the city attorney? A. I have, sir. Q. I will ask you as a matter of the policy and authority of the city, why you did not make the extension of Sander avenue come down opposite the line of Valley street which runs east and west? A. I think the idea was to avoid the damages that were handed down by the court. The amount, I believe, was sixteen thousand or seventeen thousand damages. And also we thought it necessary to connect Sander avenue with Rainier avenue. Q. That is to say, after the judgment was awarded, then to carry out your plan of connecting this side of the town with that side of the town, you adopted the proposed extension of Sander avenue? A. Naturally, yes. Because we thought we could get a cheaper proposition."

As showing that there was but one project, viz., the connection of the part of Georgetown lying to the north of the

railroad with the part lying south, the city engineer testified as follows:

"Q. The project of extending Nora avenue down and then across the railroad rights of way to Rainier avenue was for the purpose of connecting the part of Georgetown lying to the north and east of these railroads with the part lying south and west of the railroads? A. That was the intention, I will admit. Q. That was the purpose? A. Yes, sir."

It appears that the cheaper proposition referred to had reference exclusively to the amount of the award, and could not have had reference to any topographical change, for a glance at the map, keeping in view that the admitted object of the proceedings was to connect the two different parts of the town, shows that the Nora avenue route was the more feasible and desirable, because it would cross directly opposite to Rainier avenue, making a continuous avenue from one part of the city to another; while the route proposed, in order to reach Rainier avenue has to turn south at a right angle, thereby making a jog, which was avoided in the first proceeding. It is plain that the only object of this proceeding is to obtain a second trial of substantially the same propositions. Reason and authority both condemn such proceedings. *Robertson v. Hartenbower*, 120 Iowa 410, 94 N. W. 857; *Chicago etc. R. Co. v. Chicago*, 143 Ill. 641, 32 N. E. 178; *Rogers v. St. Charles*, 3 Mo. App. 41; *District of Columbia v. Moore*, 5 App. D. C. 497.

Reversed, with instructions to dismiss the proceedings.

HADLEY, C. J., RUDKIN, CROW, and MOUNT, JJ., concur.

FULLERTON, J. (dissenting).—I dissent from the judgment in this case, as I think the judgment should be affirmed. But if I am mistaken in this the order of the court should take some other form. Public rights are being dealt with, and the city of Georgetown should not be forever barred from crossing the railway at this point.

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Statement of Case.

[No. 7544. Decided October 13, 1908.]

HENRY SIPES, *Respondent*, v. PUGET SOUND ELECTRIC
RAILWAY COMPANY, *Appellant*.¹

APPEAL—NOTICE—SERVICE UPON CO-PARTY—NECESSITY — JURISDICTION—DISMISSAL OF APPEAL. Where judgment is entered in a personal injury case upon a verdict in favor of plaintiff, against one defendant for damages, and in favor of a co-defendant for costs, and appeal is taken by the unsuccessful defendant, failure to serve the notice of appeal upon the co-defendant, as required by Bal. Code, § 6504, does not deprive the supreme court of jurisdiction or work a dismissal of the appeal; since Bal. Code, § 6503, provides that service of the notice upon the prevailing party shall effect the appeal; and since such co-party has no right to appeal and no interest in the appeal taken, and the same does not go to the substance, or to the right to appeal, under Laws 1899, p. 79, which provides for the denial on terms of motions to dismiss which do not go to the substance or to the right to appeal, and for amendments to cure defects, and that appeals shall not be dismissed for informalities or defects in the notice or service if the appeal be forthwith perfected.

SAME—CURING DEFECTS—PROOF OF SERVICE ON CO-PARTY—PARTIES REPRESENTED BY SAME ATTORNEY. Upon a motion to dismiss an appeal for failure of the appellant to serve notice upon a co-party in whose favor judgment had been given, an affidavit showing that the co-party was represented by the same attorneys as the appellant, that they prepared the notice of appeal and at all times had a copy in their possession as attorneys for the co-party, and had notice of the appeal, and the co-party had no intention to join therein, cures any defect, and shows sufficient service and proof thereof, under Laws 1899, p. 79, providing that the supreme court shall disregard all objections not going to the substance or to the right to appeal and that no appeal shall be dismissed for defect in the notice or service if the appellant shall forthwith perfect the appeal.

APPEAL—NOTICE—FILING PROOF OF SERVICE. Proof of service of notice of an appeal upon a co-party need not be filed within five days limited for filing proof of service upon the prevailing party.

Motion to dismiss an appeal from a judgment of the superior court for King county, Albertson, J., entered April 11, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Denied.

¹Reported in 97 Pac. 723.

John E. Ryan, for respondent.

James B. Howe, Hugh A. Tait, and A. J. Falknor, for appellant.

CROW, J.—This action was commenced by Henry Sipes against the Puget Sound Electric Railway Company, a corporation, and W. S. Dimmock, to recover damages for personal injuries. The defendants appeared by the same attorneys, but answered separately. On a jury trial a verdict was returned, upon which judgment was entered in favor of the plaintiff and against the Puget Sound Electric Railway Company, for \$7,000 damages, and judgment was also entered in favor of the defendant W. S. Dimmock against the plaintiff, Henry Sipes, for costs. The defendant the Puget Sound Electric Railway Company has appealed.

The respondent has moved this court to dismiss the appeal for the reasons, that no notice thereof has been served upon the defendant W. S. Dimmock, who appeared and defended the action; that he has not joined in the appeal, and that this court has no jurisdiction. The respondent bases his motion to dismiss on Bal Code, § 6504 (P. C. § 1052), which provides that,

“When the notice of appeal is not given at the time when the judgment or order appealed from is rendered or made, it shall be served . . . upon all parties who have appeared in the action or proceeding.”

He insists that the defendant Dimmock having appeared, the requirement of the statute for service upon him is jurisdictional, and that failure to make such service vitiates the appeal. In support of this contention, he cites the following cases, decided by this court prior to the enactment of chapter 49, Session Laws of 1899, page 79, which amends § 19 of the act relating to appeals to the supreme court, and to which reference is hereinafter made: *Cline v. Mitchell*, 1 Wash. 24, 23 Pac. 1013; *Nelson v. Territory*, 1 Wash. 125, 23 Pac. 1013; *Jones v. Sander*, 2 Wash. 329, 26 Pac. 224; *Cadwell*

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v. First Nat. Bank, North Yakima, 3 Wash. 188, 28 Pac. 365; *Bellingham Bay Nat. Bank v. Central Hotel Co.*, 4 Wash. 642, 30 Pac. 671; *Traders' Bank of Tacoma v. Bokien*, 5 Wash. 777, 32 Pac. 744; *Johnson v. Lighthouse*, 8 Wash. 32, 35 Pac. 403; *Dewey v. South Side Land Co.*, 11 Wash. 210, 39 Pac. 368; *Fairfield v. Binnian*, 13 Wash. 1, 42 Pac. 621; *Casey v. Oakes*, 13 Wash. 38, 42 Pac. 621; *Grays Harbor Commercial Co. v. Wotton*, 14 Wash. 87, 43 Pac. 1095; *Cornell University v. Denny Hotel Co.*, 15 Wash. 433, 46 Pac. 654; *Pacific Coast Trading Co., v. Bellingham Bay Baseball Assn.*, 18 Wash. 245, 51 Pac. 382; *Hopkins v. Satsop R. Co.*, 18 Wash. 679, 52 Pac. 349; *Old Nat. Bank v. O. K. Gold Min. Co.*, 19 Wash. 194, 52 Pac. 1065; *Home Sav. & Loan Ass'n. v. Burton*, 20 Wash. 688, 56 Pac. 940; *Smith v. Beard*, 21 Wash. 204, 57 Pac. 796.

The appellant contends that under the express provisions of Bal. Code, §§ 6503 and 6504 (P. C. §§ 1051, 1052), Dimmock is not a necessary party to this appeal. Section 6503 provides:

"If the appeal be not taken at the time when the judgment or order appealed from is rendered or made, then the party desiring to appeal may, by himself or his attorney, within the time prescribed in section 6502, serve written notice on the *prevailing party or his attorney* that he appeals from such judgment or order to the supreme court, and within five days after the service of such notice he shall file with the clerk of the superior court the original or a copy of such notice, with proof or the written admission of the service thereof, and thereupon the clerk shall enter such notice, with the proof or admission of service thereon, in the journal of the court. The giving or serving of a notice of appeal as *prescribed in this section* shall effect the appeal,"

This language is susceptible only of the construction that the service of notice of appeal on the prevailing party, who in this case was the respondent and not the defendant Dimmock, followed by the filing of proof of such service within five days thereafter, is all that is necessary in the matter of

notice and service, to effect the appeal and give this court jurisdiction. Dimmock was a successful litigant. There was no order from which he could appeal, and we fail to understand how the neglect to serve him with appellant's notice deprived any party of benefits to be derived from the appeal, or prevented the respondent from perfecting an appeal in his own behalf against the defendant Dimmock. While it is true that § 6504 directs that service be made upon all parties who have appeared, it is apparent that the sole purpose of such notice to appearing parties, other than the prevailing one mentioned in § 6503, was that in the event of their having an interest in the appeal, they might join therein, if they so desired. In other words, the object of the statute was to require all interested parties to jointly prosecute their appeals and cross-appeals instead of bringing them to this court by piecemeal. It is true that, in some of the earlier cases above cited by respondent, this court technically enforced Bal. Code, § 6504, by dismissing appeals for failure to serve notice on all parties who had appeared. A more liberal construction, however, should now be placed upon said section by applying thereto the provisions of chap. 49, Laws 1899, page 79, since enacted, which are, that upon the hearing of a motion to dismiss an appeal which

"does not go to the substance of the appeal, or to the right of appeal, and the court shall be of the opinion that the moving party can be compensated in costs or by the imposition of other terms for any delay of the appellant which is made the ground of any such motion, . . . the court in its discretion may deny the motion on such terms as may be just. The court shall upon like terms allow all amendments in matters of form curative of defects in proceedings, to the end that substantial justice be secured to the parties, and no appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof . . . if the appellant shall forthwith, upon order of the supreme court, perfect the appeal."

This statute is broad in its scope, and while in *State v. Seaton*, 26 Wash. 305, 66 Pac. 397, we have held that it did

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not relieve an appeal from jurisdictional defects arising out of failure to comply with certain mandatory provisions, we have since its enactment granted relief in other cases to appellants from defects which, not being jurisdictional, did not affect the substance of the appeal, or the right to appeal. See, *Brown v. Calloway*, 34 Wash. 175, 75 Pac. 630; *James v. James*, 35 Wash. 650, 77 Pac. 1080; *Westland Publishing Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096; *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579.

The condition of the record before us shows that the failure of the appellant to serve its notice of appeal upon Dimmock does not go to the substance of the appeal, nor to the right of appeal. Dimmock was satisfied with the judgment in his favor. Not being an aggrieved party, he could not appeal. Failure to serve him deprived him of no rights, neither did it prevent the respondent Sipes from appealing as against Dimmock, either by original or cross-appeal. How, then, would the presence of Dimmock aid this court in disposing of the issues arising on this appeal between the respondent Sipes and the appellant, the Puget Sound Electric Railway Company, or how could his absence interfere with a complete administration of justice as between them? Evidently the failure to serve him does not, on the record now before us, create any jurisdictional defect in the appeal of the Puget Sound Electric Railway Company for which it should be dismissed.

The respondent, however, citing the following additional cases, decided by this court since the enactment of the statute of 1899, insists on their authority that the appeal should be dismissed. *First Nat. Bank of Seattle v. Gordon Hardware Co.*, 31 Wash. 682, 72 Pac. 464; *Wax v. Northern Pac. R. Co.*, 32 Wash. 210, 73 Pac. 380; *O'Conner v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; *Willard v. Fisher*, 36 Wash. 229, 78 Pac. 917; *Collins v. Kinnear*, 37 Wash. 453, 79 Pac. 995. An examination of these cases and the orig-

inal records on which the motions to dismiss were made, shows either (1) that a judgment had been entered against the party who had appeared and was not served with notice of appeal, or (2) that the party not served had a material interest in the prosecution of the appeal, or (3) that this court refused to dismiss the appeal. It appearing that no judgment has been entered against Dimmock from which he can prosecute either an original or cross-appeal, and that he has no interest in the appeal now being prosecuted by the Puget Sound Electric Railway Company, we conclude that, in view of the statute of 1899, these cases do not require us to enter an order of dismissal herein.

In the lower court, attorneys James B. Howe and Hugh A. Tait represented the appellant company and also the defendant Dimmock. The notice of appeal was prepared by Mr. Tait and signed by them for the Puget Sound Electric Railway Company. At all times since July 7, 1908, the date of its service on respondent, and its filing in the superior court, a copy of the notice has been in their possession, they being also attorneys for the defendant Dimmock, and as such attorneys they have at all times since had full knowledge of the appeal taken by the Puget Sound Electric Company, of its service upon respondent and of the filing of proof of such service. After the filing, but prior to the hearing of respondent's motion to dismiss, the appellant caused the following acceptance of service to be filed in the lower court, and transmitted to this court by supplemental record:

"We, the undersigned, James B. Howe and Hugh A. Tait, attorneys of record for the above named defendant W. S. Dimmock, now, on this 1st day of September, 1908, hereby acknowledge and accept, as of the 7th day of July, 1908, due service of the notice of appeal to the supreme court of the state of Washington, given in said action on said 7th day of July, 1908, by the defendant therein Puget Sound Electric Railway, a copy of said notice of appeal served on the plaintiff's attorney on said 7th day of July, 1908, being on said 7th day of July, 1908, and ever since said date, in our

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possession as attorneys for said W. S. Dimmock. James B. Howe, Hugh A. Tait, Attorneys for defendant W. S. Dimmock."

Attached to this acceptance, is the undisputed affidavit of Mr. Hugh A. Tait, in which he in substance states, that he had been at all times since the commencement of the action attorney for appellant Puget Sound Electric Railway Company and defendant W. S. Dimmock; that he has had exclusive charge of the cause; that he prepared all pleadings and papers therein for both defendants; that he tried the cause for them; that the notice of appeal to the supreme court given in the cause by the Puget Sound Electric Railway Company was prepared by him; that he, as one of the attorneys for the defendant Dimmock, had full knowledge of such appeal from the judgment in favor of respondent and against the Puget Sound Electric Railway Company; that on July 7, 1908, the day on which the Puget Sound Electric Railway Company gave its notice of appeal, he, as attorney for W. S. Dimmock, had, and ever since has had, in his possession a copy of the notice of appeal, and that it has never been Dimmock's purpose or intention to take an appeal in the cause, or to join in or contest any appeal taken by any other party. The fact that attorneys for the appellant Puget Sound Electric Railway Company were also attorneys for the defendant Dimmock did not debar them as attorneys for appellant from serving themselves with the notice of appeal as attorneys for Dimmock, there being no conflict of interest between their clients. *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786; *Woelffen v. Lewiston-Clarkston Co.*, 49 Wash. 405, 95 Pac. 493.

Under the provisions of the statute of 1899, we conclude that the above-quoted acceptance and proof of service sufficiently cures any alleged defect in the service or the proof of service of the notice of appeal upon Dimmock. In *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, decided prior to the enactment of the statute of 1899, this court, on a similar

state of facts, denied a motion to dismiss. The original record in that case shows that two foreclosure actions had been consolidated; that in one of them judgment was sought against A. M. Murphy, J. F. McEwen, and one Wilson, all of whom appeared by the same attorney and answered and defended, and that final judgment affecting all of their interests was entered in favor of the respondent Howard, one of the foreclosure plaintiffs. Murphy alone appealed. He neither directed his notice of appeal to McEwen or Wilson, the other appearing defendants, nor did he file any proof of service upon them on April 30, 1894, the date on which he filed the notice of appeal, with proof of service on Howard, the *prevailing* party. On August 15, 1894, the attorney who had appeared for Murphy, and also for McEwen and Wilson, filed a proof of personal service upon them, dated April 30, 1894, and acknowledged by himself as their attorney. The respondent Howard moved to dismiss the appeal, and in support of this motion contended that, under Bal. Code, § 6503, proof of service upon McEwen and Wilson should have been filed within five days after service upon them. Proof of service on Howard the prevailing party had been filed within five days. Appellant's attorney in his brief made the following argument in support of his appeal:

"In this connection we call the court's attention to the fact that section 4, page 121, Laws of 1893 (Bal. Code, § 6503), provides that the notice of appeal with proof of service upon the prevailing party (in this case Howard) shall be filed with the clerk of the superior court within five days after service; but that section does not provide that proof of service of the notice of appeal upon the other parties to the action shall be filed within such time. Section 5 of the act (Bal. Code, § 6504), provides that service of notice of appeal shall be made upon the other parties to the action who have appeared, but it does not provide within what time after service such proof shall be filed. . . . The only important thing is that such proof should be filed before the hearing in the supreme court, so that it may appear that the supreme court has jurisdiction of the cause. We respectfully submit that

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it was not the intention of the legislature that proof of service of notice upon parties who had not prevailed in the court below should be filed with the clerk of the superior court within the time limited for filing proof of service of notice upon the prevailing party."

While the above facts, which we state from the original record, are not detailed in the opinion of this court, it is apparent from them when stated that the contention of the appellant in the case now before us was there sustained. In denying the motion of the respondent Howard to dismiss, this court said:

"Proof of service of the notice of appeal upon the *prevailing* party was filed within five days after the service. This, with the filing of the bond, effected the appeal. Laws 1893, Ch. 61, § 4 (p. 120). The act does not prescribe when proof of the service upon co-parties with the appealing party shall be filed. *Id.* § 5 (p. 121)."

Messrs. Howe and Tait, attorneys for Dimmock, had at all times full knowledge of the appeal taken by them on behalf of their other client the Puget Sound Electric Railway Company. At all times since July 7, 1908, the notice of appeal has been in their possession, the proof of service now on file shows that fact, and is sufficient to sustain the appeal, under the authority of *Howard v. Shaw*, as elucidated by the record in that case. Since the enactment of the statute of 1899 substantially the same holding has been made by this court. In the case of *In re Murphy's Estate*, 26 Wash. 222, 66 Pac. 424, the prevailing parties were the heirs of an estate. The attorney who represented the administrator also represented the heirs, all of whom had appeared, but the notice of appeal was acknowledged by him only as attorney for the administrator. After commenting upon and quoting from the law of 1899 and the case of *Home Savings & Loan Assn. v. Burton*, 20 Wash. 688, 56 Pac. 940, this court said:

"Certainly it cannot be said that Mr. Agnew, the attorney of record for the heirs, and who now appears here as the at-

torney of the administrator, Filley, to dismiss for want of proper notice, did not have sufficient notice. His knowledge as attorney for Filley cannot be segregated from his knowledge as attorney for the heirs, who were of the prevailing parties."

Prior to the law of 1899, this court held that failure to file proof of service upon the adverse party within five days was sufficient ground for dismissal of the appeal. *Puckett v. Moody*, 17 Wash. 609, 50 Pac. 494. As an illustration, however, of the relaxing effect of the 1899 amendment upon the prior law relating to appeals, the case of *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579, may be cited. In that case this court said:

"It is conceded in this case that a proper notice was served within time, and that proof thereof was subsequently made, but not within time. This later statute was evidently intended to cover such cases. Since the appeal appears not to have been delayed, or respondents injured in any way, the motion to dismiss is denied without terms."

See, also, *Main Investment Co. v. Olsen*, 43 Wash. 480, 86 Pac. 657.

We think the earlier cases from this court cited by respondent, decided prior to the enactment of the statute of 1899, do not, in view of that statute, require us to enter an order dismissing this appeal. We so hold for the following reasons: (1) That, upon the record before us, the alleged defect arising from the want of service on the defendant Dimmock does not affect the substance of the appeal, nor the right to appeal; (2) that the defendant Dimmock has no substantial interest in the appeal now being prosecuted by the Puget Sound Electric Railway Company; and (3) that, in any event, the possession of the notice of appeal by Dimmock's attorneys, who made and served it as attorneys for the appellant the Puget Sound Electric Railway Company, was sufficient service on them as Dimmock's attorney to be actual notice of the appeal taken, and that the proof of service on Dim-

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mock filed on September 1, 1908, is sufficient filing of proof of the service, mentioned in § 6504, upon a party who had appeared but who was not the *prevailing* party in the judgment from which the appeal was taken.

The motion to dismiss is denied.

HADLEY, C. J., DUNBAR, MOUNT, and ROOT, JJ., concur.

RUDKIN, J. (concurring)—As stated in the opinion of Mr. Justice Crow, it was held in a number of early cases in this court that the provision of Bal. Code, § 6504 (P. C. 1052), requiring the service of the notice of appeal on all parties who appeared in the action, was mandatory, and that the service of the notice of appeal on all such parties was jurisdictional. If these rulings are correct, the failure to serve the notice of appeal on the defendant Dimmock in this case is not cured by the act of 1899, for we have repeatedly held that the latter act does not cure jurisdictional defects. The numerous cases in which appeals have been dismissed for failure to give an appeal and supersedeas bond in double the amount of the judgment below and the \$200 additional, are illustrations. In my opinion, however, the legislature never contemplated the service of a notice of appeal on parties who could not appeal or join in an appeal, and whose rights could in no manner be affected by any action the appellate court might take. We have so held in effect where parties appeared to disclaim, or were dismissed by consent, or where their claims were satisfied. *Doyle v. McLeod*, 4 Wash. 732, 31 Pac. 96; *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. 922; *Watson v. Sawyer*, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43; *First Nat. Bank of Seattle v. Gordon Hardware Co.*, 30 Wash. 127, 70 Pac. 251; *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786; *Sheehan v. Bailey Building Co.*, 42 Wash. 535, 85 Pac. 44.

I therefore concur in the result.

FULLERTON, J., concurs with RUDKIN, J.

[No. 7568. Decided October 15, 1908.]

ETTA WILSON, *Respondent*, v. PUGET SOUND ELECTRIC
RAILWAY COMPANY, *Appellant*.¹

APPEAL—NOTICE—SERVICE UPON CO-PARTY—NECESSITY—JURISDICTION—DISMISSAL OF APPEAL. Where judgment is entered in a personal injury case upon a verdict in favor of plaintiff, against one defendant for damages, and in favor of a co-defendant for costs, and appeal is taken by the unsuccessful defendant, failure to serve the notice of appeal upon the co-defendant as required by Bal. Code, § 6504, does not deprive the supreme court of jurisdiction or work a dismissal of the appeal; since Bal. Code, § 6503, provides that service of the notice upon the prevailing party shall effect the appeal; and since such co-party has no right to appeal and no interest in the appeal taken, and the same does not go to the substance, or to the right to appeal, under Laws 1899, p. 79, which provides for the denial on terms of motions to dismiss which do not go to the substance or to the right to appeal and for amendments to cure defects, and that appeals shall not be dismissed for informalities or defects in the notice or service if the appeal be forthwith perfected.

Motion to dismiss an appeal from a judgment of the superior court for King county, Albertson, J., entered April 18, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Denied.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for respondent.

James B. Howe and *Hugh A. Tait*, for appellant.

PER CURIAM.—This action was commenced by Etta Wilson, widow and sole heir at law of James F. Wilson, deceased, against Puget Sound Electric Railway Company, a corporation, and L. E. Bigelow, to recover damages for the death of her husband, alleged to have been caused by the wrongful and negligent act of the defendants. On trial a judgment was entered on the verdict of a jury in favor of the plaintiff and against Puget Sound Electric Railway Company, for \$2,500 and costs, and a directed judgment was entered in favor of the defendant L. E. Bigelow and against plaintiff

¹Reported in 97 Pac. 727.

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for costs. The defendant Puget Sound Electric Railway Company has appealed from the judgment entered against it.

The respondent Etta Wilson has moved for a dismissal of this appeal for the reasons that the defendant L. E. Bigelow, who appeared and defended the action, was not served with notice of appeal; that he has taken no cross-appeal, and that this court therefore has no jurisdiction.

The only distinction between the facts in this case and those in the case of *Sipes v. Puget Sound Electric R. Co.*, ante p. 585, 97 Pac. 723, in which we have on this date filed an opinion denying the respondent's motion to dismiss an appeal, is that the defendants herein appeared by different attorneys, and that neither the defendant L. E. Bigelow nor his attorney was served with notice of this appeal, or at any time admitted service thereof. The record in this case does show that L. E. Bigelow was a successful litigant, judgment being entered in his favor against the respondent Etta Wilson; that he was not the *prevailing* party in the judgment from which Puget Sound Electric Railway Company has appealed; that not being an aggrieved party, there was no judgment from which he could appeal; that he is not a necessary party to the appeal of Puget Sound Electric Railway Company, not being interested therein, and that failure to serve him with notice thereof neither prejudiced the respondent Etta Wilson, nor prevented her from taking an original or cross-appeal as against him, if she desired so to do. The failure of Puget Sound Electric Railway Company to serve the defendant L. E. Bigelow with notice of its appeal is therefore not such an omission or defect as goes to the substance of its appeal or its right of appeal. Under this condition of the record, and in view of the provisions of chapter 49, Laws 1899, page 79, the respondent's motion to dismiss must be denied on the authority of *Sipes v. Puget Sound Electric R. Co.*, *supra*, for the reasons therein first discussed.

The motion to dismiss is denied.

[No. 7436. Decided October 15, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. W. W. GLASBY,
Appellant.¹

COURTS—RULE OF DECISIONS—FEDERAL QUESTION. Questions involving interstate commerce must be controlled by the decisions of the United States supreme court.

COMMERCE—INTERSTATE COMMERCE—SOLICITING ORDERS FOR NON-RESIDENT. The business of soliciting orders for goods by one in the employ of a nonresident of this state, to be filled by the employer and shipped by him into this state, if the orders are accepted, is interstate commerce, and is not subject to regulation by the enactment of an ordinance requiring the payment of a license fee therefor, regardless of whether there is any discrimination between residents and nonresidents.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered April 21, 1908, upon a trial and conviction of the violation of an ordinance regulating peddlers. Reversed.

E. B. Dufur, for appellant.

A. J. Allen, for respondent.

HADLEY, C. J.—The defendant in this action was convicted, in the police court in the city of South Bend, Washington, of the charge of violating an ordinance of that city concerning the imposition and regulation of licenses. The penalty imposed by the police justice was a fine of \$10 and costs. On appeal to the superior court of Pacific county, the judgment of the police court was affirmed, and the defendant has appealed to this court.

The cause was tried in the superior court on an agreed statement of facts, the material facts being as hereinafter set forth. Omitting the title and all formal parts, the ordinance [No. 366] in question is as follows:

"Sec. 1. Every person canvassing or taking orders for pictures, clothing, groceries or any other merchandise, either

¹Reported in 97 Pac. 734.

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for immediate or future delivery, within the city of South Bend, shall be deemed a peddler, and shall pay a license fee of \$10.00 per day.

"Sec. 2. Any peddler who pursues the said calling referred to in Sec. 1 of this ordinance, without having first procured a license therefor, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall pay a fine of not more than fifty dollars together with costs of prosecution.

"Sec. 3. The city clerk is hereby authorized to issue Peddlers' licenses upon application, and to collect the aforesaid license fee.

"Sec. 4. Commercial travelers employed by wholesale houses and selling at wholesale only, staple articles of merchandise, shall not be deemed peddlers within the meaning of this ordinance. All ordinances or parts of ordinances in conflict herewith are hereby repealed."

The charge against the appellant was that of peddling without a license in violation of the ordinance. Brettell Brothers are a firm residing in Portland, Oregon, and having their business in that city and state. They have no agency or branch business within the state of Washington. The firm is engaged in supplying the trade with coffees, teas, spices, and staple groceries upon orders therefor sent to them at the city of Portland by their traveling agents and solicitors employed by the firm to canvass for, solicit, and secure orders for their goods. The traveling agents and solicitors do not deliver the goods ordered; they simply secure orders by sample, and send the orders to the firm in Portland. The firm may accept or reject the orders as they choose, and such as they accept are filled, and the goods are shipped and delivered to the respective parties in unbroken packages, by persons other than the traveling agents and solicitors securing the orders. The appellant is a citizen of Oregon, and was in the employ of the firm of Brettell Brothers as a traveling agent and solicitor for orders for their goods, securing such orders by samples with which appellant was provided by his employers. The appellant never sold or undertook to sell any

of his employers' goods further than to secure orders therefor and to forward such orders to his employers in the city of Portland, Oregon. He did not in person deliver any of the goods to customers.

Appellant argues that the ordinance in question violates section 8 article 1 of the Constitution of the United States, with reference to the power of Congress to regulate commerce between the several states. He insists that the case of *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721, is decisive of this case in his favor. We think that case cannot be said to be in all particulars decisive of this one. The statute there under consideration provides: "After shipment to the state" one who canvasses and sells by sample to consumers certain specified articles of merchandise shall pay in advance a license tax of \$200 per year, to be paid in each county where the sales are made. It was held that the clause in the statute "after shipment to the state" has the effect of discriminating in favor of goods manufactured in this state and against those shipped here from a sister state, for which reason it violates the provisions governing interstate commerce. The decision was apparently rested upon the element of discrimination. That feature is lacking in the case at bar. The ordinance makes no discrimination in favor of residents of this state, but its provisions apply to all, both residents and non-residents. We must therefore examine as to the status of residents of another state under such an ordinance, in view of their right to protection for the purposes of interstate commerce.

If a question of interstate commerce is involved, then manifestly the subject must be controlled by the decisions of the supreme court of the United States, as that tribunal is clothed with the power of final interpretation where Federal questions are concerned. That a question of interstate commerce is involved seems to be clear, from the decision in *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592,

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30 L. Ed. 694. A statute of Tennessee was there under consideration. It provided that:

"All drummers and all persons not having a regularly licensed house of business in the taxing district of Shelby county, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee, the sum of \$10 per week, or \$25 per month for such privilege."

It was held that the statute applied to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state, and that so far as it applied to them it was a regulation of commerce among the states and violated the constitution of the United States, which grants to Congress the power to make such regulations. The language of the opinion is strong, clear, and conclusive. We call attention to the entire opinion, and particularly to the following extract, which shows the trend of the reasoning:

"In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is the manufacturer, or a merchant, of one state, to sell his goods in another state, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in

which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things."

On the question of discrimination between residents and nonresidents, to which we have hereinbefore referred, the court, in the same opinion, further said:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *The State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

It will thus be seen that the matter of discrimination is immaterial. Interstate commerce cannot be taxed at all,

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notwithstanding the fact that a domestic tax may have been levied upon the same class of trade in a given state. There is no essential difference in principle between the case at bar and the one before cited from the supreme court of the United States. For confirmation of the principles announced in that case see the following later decisions: *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. 655, 30 L. Ed. 699; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785.

Touching the argument that such license tax is within the police regulative power of the state, the court in *Crutcher v. Kentucky*, *supra*, said:

"But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a state may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of *Leisy v. Hardin*, 135 U. S. 100, that a state law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by Congress, declaring that the traffic in such liquors as articles of merchandise between the States shall be free. There are, undoubtedly, many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the State."

The respondent cites the case of *Titusville v. Brennan*, 143 Pa. St. 642, 22 Atl. 893, 24 Am. St. 580, 14 L. R. A. 100, which strongly supports respondent's contention. But that

decision was reversed by the supreme court of the United States in *Brennan v. Titusville*, *supra*. The following Michigan cases are also cited by respondent: *City of Alma v. Clow*, 146 Mich. 443, 109 N. W. 853, and *People v. Smith*. 147 Mich. 391, 110 N. W. 1102. At first glance these opinions seem to support respondent's contention, and a hasty reading of them leads the reader to inquire if they are consistent with the prior decision of the supreme court of Michigan in *People v. Bunker*, 128 Mich. 160, 87 N. W. 90, cited by appellant. In that case the court followed and discussed some of the decisions we have cited above, and that decision was a departure from some that had been rendered in the earlier history of Michigan. The court apparently bowed to the wisdom and interpretation of its superior, the supreme court of the United States. Careful examination of the two later Michigan cases, however, shows that the court decided upon the facts that no question of interstate commerce was involved. In the first of the two, a New Jersey corporation maintained a warehouse in Michigan from which its trade in that state was supplied, and in the second, the agent, also a New Jersey corporation, sold some goods from a stock kept on hand in the state, and distributed premiums out of such stock. On such facts, the cases were decided on the theory that the stock of goods kept within the state for the supply of the trade therein gave to the corporation in each instance the status of a domestic corporation, and that no question of interstate commerce was, for that reason, involved. There is, therefore, no inconsistency in the Michigan decisions when we consider the theory of that court as to the facts in the different cases. No facts exist in the case at bar that classify it with the two Michigan cases mentioned, even if the reasoning of those cases should be approved by the Federal supreme court. No warehouse or stock of goods is kept within this state from which goods are received to fill orders, but all orders are sent to Portland, Oregon, and are filled there by appellant's employers, who reside there and whose supply

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house is there. The business in which appellants were engaged was therefore clearly interstate, and was not subject to regulation by this state or a municipality thereof.

The judgment is reversed, and the cause remanded with instructions to vacate the judgment, dismiss the action, and discharge the appellant.

RUDKIN, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7069. Decided October 15, 1908.]

G. M. LAURIDSEN, *Respondent*, v. F. S. LEWIS, *Appellant*.¹

APPEAL—EXCEPTIONS. Findings of fact to which no exceptions are taken are binding and will be liberally construed.

EXECUTORS AND ADMINISTRATORS—PROCEEDINGS—CONCLUSIVENESS—LACHES. A creditor of an estate having a preferred claim which was on presentation disallowed for want of funds, who took no appeal or proceedings to question the administrator's sale of real estate for a nominal sum, or the administrator's discharge on final accounting, until after the lapse of more than three years and then only to interpose his claim as a counterclaim to an action on account, is concluded by the probate proceedings, and cannot reopen the same for fraud which he might have discovered with reasonable diligence.

ESTOPPEL—LACHES—ACQUIESCENCE IN PROCEEDINGS—FINDINGS—CONSTRUCTION—SUFFICIENCY. Findings of fact, not excepted to, sufficiently show that a creditor of an estate was guilty of laches and is precluded from asserting fraud on the part of the administrator in disposing of property of which he was trustee of an express trust, where the findings recite that the sale by the administrator was made in good faith, and that the creditor had knowledge of facts that would lead a reasonably prudent man to the discovery of the fraud, if there was any, and did not use ordinary diligence, but acquiesced in probate proceedings and slept on his rights for an unreasonable time; as findings are to be liberally construed and objection to them as conclusions should be raised below by taking exceptions.

Appeal by defendant from a judgment of the superior court for Clallam county, Still, J., entered July 9, 1907, upon

¹Reported in 97 Pac. 663.

findings made by the court after a trial on the merits without a jury, dismissing the complaint and defendant's counterclaim, in an action on contract. Affirmed.

Trumbull & Trumbull, for appellant.

A. W. Buddress, for respondent.

Root, J.—This action was commenced by plaintiff, in March, 1906, to recover \$80 alleged to be due for merchandise. Defendant answered by denials, and affirmative defenses and a counterclaim, to which plaintiff replied by a general denial and new matter. The case was tried by the court without a jury, and findings were made to the effect that the plaintiff's cause of action was barred by the statute of limitations, and that defendant could not prevail upon his counterclaim by reason of laches and the statute of limitations; whereupon the action was dismissed at plaintiff's cost. From the judgment the defendant appeals.

No exceptions were taken to the findings of fact, and the only question here presented is as to their sufficiency to sustain the court's conclusion as to appellant's counterclaim. The findings, in so far as they touch upon the question of counterclaim, show substantially the following facts: That appellant, in the year 1901, rendered services as a physician to one David R. Burness, who died on the 19th day of October, 1901; that Burness was the owner of certain real estate in Clallam county, and in the state of Kansas, and also some personal property; that prior to his death, believing his sickness fatal, he conveyed all of his real property to this respondent, and at said time wrote and signed the following declaration as to the purposes of said conveyance:

"Port Angeles, Wash., May 7th., 1901.

"I, D. R. Burness, being of sound mind, state the following as my last wishes and wish that hereinafter mentioned to be done in event of my death.

"G. M. Lauridsen I appoint to have full control of my affairs without the aid of the court. I have deeded to him all

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of my property and what I owe him he is to take out first of the proceeds of sale of said property real as well as personal. He is to pay all of my debts that he may deem just, and whatever may be left after all such debts are paid he will remit to my sister in Scotland, Mrs. McGregor, of Rutland Hotel, Edinburg. My watch is to be a gift to G. M. Lauridsen.
D. R. Burness."

that a few days prior to the death of Burness, to wit, on the 15th day of October, 1901, respondent filed the deed for record with the auditor of Clallam county; that appellant did not know of the declaration hereinbefore set forth until after the commencement of the present action, but at divers times while he was attending Burness as his physician, Burness stated, in presence of both appellant and respondent, that he had turned all of his property over to respondent; that on the 26th day of October, 1901, respondent filed his petition for letters of administration on the estate of Burness, wherein it was stated that Burness died intestate and possessed of certain real estate therein described, which description covered the property conveyed in the deed by Burness to this respondent; that respondent was appointed administrator, gave notice to creditors, took an order of sale of the real estate, and sold the same; that prior to said sale respondent entered into an agreement with one Moore, whereby the latter was to bid in the real estate for a nominal price; and in accordance with said agreement, Moore, on the 22d of March, 1902, bid in the real estate for \$55, and on April 4 following, respondent, as administrator, made a deed of said property to Moore, and on the next day Moore conveyed all of said property by quitclaim deed to respondent, for a consideration of \$60, and that thereafter respondent claimed to own said property absolutely; that appellant filed his claim of \$244 for professional services with respondent as administrator, and the same was allowed and approved, but payment was refused for want of funds belonging to the estate; that on January 28, 1902,

respondent filed a supplemental inventory and attached thereto the declaration of Burness hereinbefore set forth; that on the 13th of February, 1903, respondent, as administrator, filed his final account, and on the 28th of February, 1903, the court made a decree settling and allowing said account and discharging the administrator; that on the 2d of February, 1903, respondent sold to one Wold a portion of the real estate for \$2,650, and in February, 1905, sold other portions for \$100, and also received \$50 for the lots in Kansas and the sum of \$57.50 in rent, and sold a safe belonging to the estate for \$60; that he paid out for taxes on tide lands of the estate the sum of \$560.95; that respondent "had said estate probated and gave due notice to the creditors and, pending the said probate thereof, sold and re-purchased the lands hereinbefore mentioned, in good faith." In addition to these facts the court found as follows:

"That F. S. Lewis, the defendant, had full knowledge of his legal rights, and that his claim was a preferred claim in the probate proceedings, but slept upon his legal rights for an unreasonable time under the circumstances of this case; that his long acquiescence in the probate decree, and his failure to enforce or attempt to enforce the payment of his claim of \$244 is in law and equity equivalent to affirmation and operates as a bar in equity. That defendant had ample opportunity to assert his said preferred claim in the probate proceedings but wholly failed to do so.

"That the defendant had knowledge of facts which would lead a reasonably prudent man to the discovery of fraud if there was any in the premises; the defendant did not use ordinary diligence to inform himself of all the facts and to avail himself of the means to detect fraud and in equity should be barred and defendant estopped.

"That defendant never attempted to enforce the payment of his said claim either against plaintiff as trustee or as administrator or individually until about more than three years had elapsed and was himself sued by plaintiff."

Inasmuch as no exception was taken by appellant to the findings, they must be held as binding against him. It is

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urged that some of the findings are nothing more than conclusions, and that they are indefinite and confusing. If these objections are good, they should have been raised by exceptions taken in the lower court in the manner provided by the statute. Where no exceptions are taken to the findings, an appellate court will ordinarily give them a liberal construction rather than overturn the judgment based thereupon. It appears that appellant presented his claim to the administrator, and when the same was not paid and the final account of the administrator approved and allowed and himself discharged, he took no appeal or other procedure to question the correctness of the doings of the administrator or the rulings of the court in the premises. The decision of the court in the probate proceedings would therefore seem to be conclusive against him, in so far as his rights were involved therein.

But it is urged that the declaration signed by Burness constituted respondent a trustee of an express trust, and that appellant did not know of such declaration until after the commencement of the present action, and that he may now maintain his counterclaim by reason of the fraud perpetrated by appellant in the disposition of the property. But the findings seem to prevent this. The court finds that the action of the respondent in regard to selling and repurchasing the lands was in good faith. In the declaration signed by Burness, he directs respondent to take out from the first proceeds of the sale of the property what he owes him. There is nothing shown in the findings as to how much Burness owed respondent. The evidence, which is not brought before us, may have shown this amount. There is no finding as to the total amount of debts and expenses paid by respondent. If the evidence as to all of these matters were before the court, we might perhaps form an opinion as to whether the action of the respondent was in good faith or otherwise. But these matters not being brought before us, we must presume that the evidence touching them and other matters involved was

such as to justify the trial court in its findings of good faith. It appears from the findings that the appellant knew, while he was rendering services to Burness as his physician, that said Burness had conveyed all of his property to respondent, and the court expressly finds that "the defendant had knowledge of the facts which would lead a reasonably prudent man to the discovery of the fraud if there was any in the premises," and that he did not use ordinary diligence and inform himself; and furthermore that he slept upon his legal rights for an unreasonable time under the circumstances and acquiesced in the probate decree. If these things are true—and they must be accepted as such, inasmuch as no exception was taken to them—the trial court was justified in deciding against the counterclaim.

The judgment will be affirmed.

HADLEY, C. J., CROW, DUNBAR, RUDKIN, FULLERTON, and MOUNT, JJ., concur.

[No. 7165. Decided October 15, 1908.]

HORACE KIMBALL, *Receiver of the State Bank of Washington, Respondent*, v. FARMERS & MECHANICS BANK, *Appellant*.¹

BANKS AND BANKING—CONTRACTS—AGREEMENT TO ACCEPT CHECKS AS CASH—EVIDENCE—FINDINGS—SUFFICIENCY. The president and cashier of the defendant bank agreed to accept checks for \$10,000 as cash and credit the same to a new bank about to be organized, where it appears that the checks were given as payment for subscriptions to stock in the new bank, to enable it to perfect its organization and do business; that, although the drawers of the checks had no funds in the defendant bank, its cashier stated to the incorporators of the new bank that the checks were good and would be paid; and that defendant bank made statements showing that the amount was credited to the account of the new bank, and so represented it to the stockholders thereof.

¹Reported in 97 Pac. 748.

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SAME—REPRESENTATION BY OFFICERS—AUTHORITY TO MAKE LOANS—CUSTOM. The president and cashier of a bank are authorized to accept checks for \$10,000 as cash, and credit the same to a new bank, although the drawers had no funds, the checks having been given in payment of subscriptions to the stock of the new bank, where it appears that in several years the board of trustees and the executive committee had each held only three meetings, that at none of the meetings was any question of loans acted upon, and the entire management was left to the president and cashier, who customarily loaned out large sums without consulting the trustees or executive committee.

ACTIONS—CONDITIONS PRECEDENT—DEMAND—BANKS AND BANKING. In an action against a bank to recover the amount of a credit given to another bank, a demand before suit is not necessary where it appears that the same would have been vain and fruitless.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 20, 1907, upon findings in favor of the plaintiff, after a trial before a court without a jury, in an action on contract. Affirmed.

Merritt, Oswald & Merritt, for appellant.

Cullen & Dudley and *S. R. Stern*, for respondent.

PER CURIAM.—On the 20th day of April, 1905, E. W. Swanson, A. J. Swanson, M. F. Setters, and O. B. Setters, met in a room adjoining the banking house of the defendant bank, for the purpose of organizing and incorporating the State Bank of Washington. Articles of incorporation were executed in triplicate, and in payment of the three-fifths of the capital stock, required by law to be paid in, E. W. Swanson and A. J. Swanson each drew his check on the defendant bank in the sum of \$5,000, payable to the State Bank of Washington; O. B. Setters drew his check on the defendant bank for the sum of \$2,500, payable to the State Bank of Washington, and M. F. Setters drew his check on the defendant bank for the sum of \$1,500, and a check on the Fidelity National Bank of Spokane for the sum of \$1,000, each payable to the State Bank of Washington. These several checks

were presented to the cashier of the defendant bank, and the incorporators thereupon made affidavit that three-fifths of the capital stock had been paid in as required by law. About a month thereafter the State Bank of Washington opened its doors for business, and about one year thereafter became insolvent.

The plaintiff in this action was appointed receiver for the insolvent bank by the superior court of Spokane county, and this action was instituted by the receiver to recover from the defendant bank the \$14,000 represented by the Swanson and Setters checks issued against it, and certain other small items not deemed material here. The court below gave judgment against the defendant for the \$10,000 represented by the checks of the two Swansons, with legal interest, and from that judgment the present appeal is prosecuted.

The principal questions presented by the appeal are questions of fact. They are, (1) did the president and cashier of the appellant bank agree to accept the two Swanson checks as cash, and credit the State Bank of Washington with the amount thereof; (2) if so, were they authorized so to do by the appellant bank; and (3) were the checks charged back against the State Bank of Washington by its authority or with its consent. The findings of the court on these issues were as follows:

"That prior to said April 20th, 1905, E. W. Swanson, who was then secretary of said Farmers' Grain & Supply Company, suggested to Donald Urquhart, the president of the defendant bank, that it would be for the interest of said bank to have a bank established in the city of Spokane, on the south side of the Spokane river, said defendant bank being upon the north side of said river, to operate in connection with said defendant bank and to aid in financing said Farmers Grain & Supply Company; and it was arranged between said parties, prior to said April 20th, 1905, that the said E. W. Swanson, A. J. Swanson, brother of said E. W. Swanson, and their associates, should organize a corporation for the purpose of establishing such bank, and should establish the same: and that the defendant bank should advance them the moneys

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necessary for such purpose, they being without sufficient means therefor.

"That on the 20th day of April, 1905, said E. W. Swanson, A. J. Swanson, M. F. Setters and O. B. Setters, duly executed in triplicate articles of incorporation for the State Bank of Washington; it being provided, among other things, that one of the objects of said corporation was to carry on and conduct a banking business, and that the capital stock of said corporation should be twenty-five thousand dollars, to be divided into two hundred and fifty shares of the par value of one hundred dollars each; and that at said time the said parties duly subscribed for all of the capital stock of said corporation. That said articles of incorporation were acknowledged before J. H. Claney, who was a notary public of the state of Washington, and was then and there the cashier of the defendant bank.

"That at the time of the execution of said articles of incorporation, the said E. W. Swanson and A. J. Swanson each drew a check upon the said Farmers and Mechanics Bank, payable to the State Bank of Washington, for the sum of five thousand dollars; the said O. B. Setters drew a check upon the said Farmers & Mechanics Bank, payable to the State Bank of Washington for the sum of two thousand five hundred dollars; and the said M. F. Setters drew a check upon the said Farmers and Mechanics Bank, payable to the State Bank of Washington, for the sum of fifteen hundred dollars; and drew a check upon the Fidelity National Bank of Spokane, payable to the State Bank of Washington, for the sum of one thousand dollars. That said checks were so drawn for the purpose of paying for sixty per cent of the capital stock of said corporation so subscribed for by said parties. That immediately upon the making of said checks the same were exhibited to the said J. H. Claney, cashier of said defendant bank, who was then and there asked if the same were good; and that the said Claney then and there stated to the said parties that said checks were good, and would be paid; and said checks were then and there delivered to the said cashier of defendant bank. That immediately the said parties signed and swore to the following affidavit before the said Claney:

"State of Washington, County of Spokane—ss.

"M. F. Setters, Albert J. Swanson, O. B. Setters and Edward W. Swanson and _____ being first duly

sworn, each for himself and not for the other, upon his oath say, that he is one of the board of directors of "The State Bank of Washington" of Spokane, articles of incorporation of which said bank are herewith filed and that three-fifths (3-5) of the capital stock of said bank has actually been paid in. M. F. Setters, Albert J. Swanson, O. B. Setters, Edward W. Swanson.

'Subscribed and sworn to before me this 20th day of April, A. D. 1905. (Notarial Seal.) J. H. Claney, Notary Public for the State of Washington, residing at Spokane.'

"That at the time of drawing said checks and making said affidavit, the said E. W. Swanson did not have on deposit in said Farmers and Mechanics Bank, in excess of fourteen hundred dollars; the said A. J. Swanson's account in said bank was overdrawn to the amount of about five dollars; the said O. B. Setters was not a depositor in said Farmers and Mechanics Bank, and had no money on deposit therein; that the said M. F. Setters had on deposit therein and subject to his check, although such deposit was standing in the name of said E. W. Swanson, as trustee, about fifteen hundred dollars; and said M. F. Setters had on deposit in the Fidelity National Bank in Spokane, subject to his check, one thousand dollars or more, and the said check drawn on said Fidelity National Bank was good.

"That the said O. B. Setters and M. F. Setters were without knowledge as to the deposits of the said A. J. Swanson and E. W. Swanson in said Farmers and Mechanics Bank; and had no knowledge as to whether the checks drawn by the said Swansons were good, save and except as they were informed by the said Claney, cashier of said Farmers and Mechanics Bank.

"That immediately upon the execution of said articles of incorporation, subscription paper and affidavit, one copy of said articles of incorporation and said affidavit were forwarded to the secretary of state of Washington, for recording, together with all fees, and were duly recorded on the 22d day of April, 1905; and that a second copy of said articles was duly filed with the auditor of Spokane county on the 25th day of April, A. D. 1905.

"That in making said affidavit and executing, recording and filing said articles, the said parties relied upon the statement of the said Claney that said checks were good and would

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be paid; and understood and believed that the said Farmers and Mechanics Bank was receiving said checks and placing the same to the credit of said State Bank of Washington, as cash.

"That the said Claney, cashier of said Farmers and Mechanics Bank, at the time of taking the acknowledgement to said articles of incorporation, and of attaching the jurat to said affidavit, and at the time of giving the assurances that said checks would be paid, knew that said parties were incorporating a bank, that the checks were so given for the purpose of paying for the capital stock thereof, that said affidavit was so made in reliance upon his assurances that said checks were good and would be paid by his bank, and with the understanding that said checks were deemed and considered as cash by the said Farmers and Mechanics Bank; and that the said parties proposed to open a bank relying upon there being fifteen thousand dollars deposited to its credit in said Farmers and Mechanics Bank by virtue of the acceptance of said checks by said bank.

"That on the 26th day of April, 1905, and after the articles of incorporation of said State Bank of Washington had been recorded in the office of the secretary of state of said state, and filed in the office of the auditor of said Spokane county, the said Claney, cashier of said Farmers and Mechanics Bank, who had retained possession of said checks after their delivery to him April 20th, 1905, caused the same to be stamped 'paid;' and caused an entry of the amount thereof, to wit: fifteen thousand dollars, to be made in the books of said Farmers and Mechanics Bank as a cash deposit in the name of said State Bank of Washington. That thereafter, and on the same day, said cashier caused to be made on the books of said Farmers and Mechanics Bank, a further entry charging said State Bank of Washington with the amount of the checks drawn as aforesaid upon said Farmers and Mechanics Bank by the said incorporators, to wit: fourteen thousand dollars. That the charging of said checks against the said State Bank of Washington, was not authorized by the State Bank, or of any of the officers thereof, or by any of said incorporators; and none of said parties had any notice or knowledge thereof prior to June 27th, 1905, if then.

"That on the 15th day of May, 1905, the said State Bank of Washington, the said M. F. Setters, O. B. Setters, A. J.

Swanson and E. J. Swanson, being the trustees thereof, commenced to transact a banking business in the city of Spokane on the south side of the Spokane river; and thereafter received a large amount of deposits and did a general banking business. That at the time of so commencing business, the said incorporators and the officers of said bank had no notice or knowledge that the said Farmers and Mechanics Bank had charged against said State Bank of Washington, said sum of fourteen thousand dollars, or any sum, but believed, and in so opening said bank acted upon the belief, that there was on deposit in said Farmers and Mechanics Bank to the credit of said State Bank of Washington, the sum of fifteen thousand dollars; and that whatever overdrafts were made by said checks drawn April 20th, 1905, were charged to the account of the respective parties drawing such checks.

"That on the 27th day of June, A. D. 1905, the said defendant bank issued and delivered to the State Bank of Washington, a statement of the account between said banks, in which it appeared that the said checks deposited April 20, 1905, were accepted and treated as a cash deposit in favor of the State Bank of Washington, by said defendant, Farmers and Mechanics Bank, and that said sum was so on deposit in said Farmers and Mechanics Bank in favor of said State Bank of Washington. That said statement did not show that the amount of said checks, or any thereof, was charged against said State Bank of Washington, by said Farmers and Mechanics Bank.

"That on or about March 10, 1907, Donald Urquhart, then president of the said defendant bank, executed and delivered to the said E. W. Swanson, the following statement, written upon the letter head of said Farmers and Mechanics Bank, to wit:

"Spokane, March 10th, 1906.

"To the Stockholders and Depositors of the State Bank of Washington:

"This is to certify that the Farmers and Mechanics Bank received from E. W. Swanson and A. J. Swanson, ten thousand dollars about April 20th last, and that said sum was placed to the credit of the State Bank of Washington, and said sum is now to the credit of said bank, and will be held by this, the Farmers and Mechanics Bank, for the protection of the stockholders and depositors of the State Bank of

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Washington, of the Peoples Bank, which is one and the same. We have no hesitancy in recommending to you Mr. E. W. Swanson, as a man of excellent habits, energetic and trustworthy, and will make you a good man. We understand that in severing his connections with his former company, the Farmers Grain and Supply Company, he is doing so in order to devote more of his time to the banking business as well as closing up the affairs of the Spokane and Columbia River and Navigation Company. You will always find this bank ready and willing to assist you at all times and to do whatever it can to promote your interests, and we look forward to a good business that will prove mutually advantageous to all concerned. We see no reason why another bank of the south side should not prosper as it would seem that there is a good opportunity to work up new business. We are,

‘Yours very truly, Donald Urquhart, President.’

“That said letter of March 10, 1906, was not shown to any other stockholder or depositor of said State Bank of Washington by said E. W. Swanson. But said letter was so given by said president of said Farmers and Mechanics Bank, for a valuable consideration moving to said Farmers and Mechanics Bank, to wit: The assignment of a certain chose in action to said bank, which said bank accepted and thereafter sued upon.

“That the said Farmers and Mechanics Bank was organized in March, 1904, and that there had been but three meetings of the board of trustees of said bank prior to April 20th, 1905, to wit: One meeting at the time of the organization of said corporation in March, 1904, one meeting held for the election of officers in July, 1904, and the regular annual meeting held in January, 1905. That the executive committee of said bank had held but three meetings prior to April 20th, 1905, two in November, 1904, and one December 1, 1904; that the majority of the members of said board of trustees were nonresidents of the city and county of Spokane; and that none of the meetings of said board or of said executive committee, was any question of loans acted upon. That said board of trustees said and did, in fact, leave the entire management of said bank to Donald Urquhart, the president, and to the cashier; and that it was the custom of said cashier and president to loan out large sums of money without consultation with the said board of trustees or said executive

committee; and that the said E. W. Swanson and A. J. Swanson were familiar with such custom, as were also the said board and committee.

"That the said cashier had authority from said Farmers and Mechanics Bank on the 20th day of April, 1905, to make loans by accepting and honoring overdrafts, in the manner in which the drafts of the said E. W. Swanson, M. F. Setters and O. B. Setters, were accepted by such cashier April 20th, 1905.

"That the action of the said cashier in accepting said checks April 20th, 1905, and agreeing to pay the same was authorized by the said president of said bank, Donald Urquhart.

"That the said cashier, J. H. Claney, and the said Donald Urquhart, president of said defendant bank, had no personal interest in the said State Bank of Washington, or in the said chose in action assigned to said defendant bank in consideration of the issuance of said statement of March 10, 1906, and that the action taken by said officers was solely for the purpose of benefiting the said Farmers and Mechanics Bank.

"That the said sum of fifteen thousand dollars has not, nor has any part thereof, entered to the credit of said State Bank of Washington on the books of the said Farmers and Mechanics Bank, as heretofore stated, ever been paid by the said Farmers and Mechanics Bank to the said State Bank of Washington, or for or on its account, or to the receiver thereof, save and except by the return of the checks and note of said M. F. Setters and O. B. Setters as hereinbefore stated."

We deem it unnecessary to discuss or review the voluminous testimony found in this record, further than to say that, while it is conflicting in some respects, we think the preponderance and weight of the testimony is decidedly in favor of the findings made.

It is contended that no proper demand was made upon the appellant bank for the payment of this money, but where the record shows that a demand would be vain and fruitless, as does the record before us, the law does not require it. 1 Cyc. 698.

There is no error in the record and the judgment is affirmed.

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Citations of Counsel.

[Nos. 7301, 7302. Decided October 10, 1908.]

ALMA CABLE, *as Administratrix etc., Appellant*, v. SPOKANE
& INLAND EMPIRE RAILROAD COMPANY, *Respondent*.¹

SADIE CABLE, *a Minor, by John H. Marks, her Guardian Ad
Litem, Appellant*, v. SPOKANE & INLAND EMPIRE
RAILROAD COMPANY, *Respondent*.

RAILWAYS—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE. The driver of an open buggy is guilty of contributory negligence in not stopping to look and listen before driving upon an interurban railway track, precluding any recovery, where it appears that he knew the train was approaching and that the trains were customarily run at high speed, although there were freight cars obstructing the view to some extent and he expected the train to slow down to stop at the station.

SAME—PASSENGER IN A BUGGY. Where the driver of an open buggy is guilty of contributory negligence in driving upon an interurban railway crossing without stopping to look or listen, his daughter riding with him, seventeen years of age, is likewise subject to the rules that she must "stop, look, and listen," in the absence of a showing that she endeavored to stop the horse or have her father do so, or any attempt on her part to take precaution, or that she was prevented from doing so.

Appeal from judgments of the superior court for Spokane county, Huneke, J., entered October 12, 1907, in favor of the defendant, upon withdrawing issues from the consideration of the jury, dismissing actions for wrongful death and personal injuries, resulting from a collision at a railway crossing. Affirmed.

Alder C. Clausen and *Samuel T. Crane*, for appellant, contended, among other things, that the question of deceased's contributory negligence was for the jury, in view of the obstructions to the view and the great speed of the train. *Mackay v. New York Cent. R. Co.*, 35 N. Y. 75; *Kellogg v. New York Cent. etc. R. Co.*, 79 N. Y. 72; *Pennsylvania R.*

¹Reported in 97 Pac. 744.

Co. v. Ogier, 35 Pa. St. 50; *Beisiegel v. New York Cent. R. Co.*, 34 N. Y. 622, 90 Am. Dec. 741; *Bouwmeester v. Grand Rapids etc. R. Co.*, 63 Mich. 557, 30 N. W. 337; *Schaidler v. Chicago etc. R. Co.*, 102 Wis. 564, 78 N. W. 732; *Battis-hill v. Humphreys*, 64 Mich. 494, 514, 38 N. W. 581; *Knapp v. Sioux City & P. R. Co.*, 65 Iowa 91, 21 N. W. 198, 54 Am. Rep. 1; *Teipel v. Hilsendegen*, 44 Mich. 461, 7 N. W. 82; *Park v. O'Brien*, 23 Conn. 339; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *Shaber v. St. Paul etc. R. Co.*, 28 Minn. 103, 9 N. W. 575; *Abbett v. Chicago etc. R. Co.*, 29 Minn. 482, 16 N. W. 266; *Mares v. Northern Pac. R. Co. (N. D.)*, 21 N. W. 5; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17; *Bohan v. Milwaukee etc. R. Co.*, 58 Wis. 30, 15 N. W. 801; *Townley v. Chicago etc. R. Co.*, 53 Wis. 626, 11 N. W. 55; *Ireland v. Oswego etc. Plank Road Co.*, 13 N. Y. 526. Acts, whether negligent or otherwise, induced by the negligence of respondent of which they are presumed to be cognizant, cannot avail respondent of the doctrine of contributory negligence. *Romick v. Chicago etc. R. Co.*, 62 Iowa 167, 17 N. W. 458; *Palmer v. Detroit etc. R. Co.*, 56 Mich. 1, 22 N. W. 88; *Laverenz v. Chicago etc. R. Co.*, 56 Iowa 689, 10 N. W. 268; *Northern Pac. R. Co. v. Holmes*, 3 Wash. Terr. 202, 14 Pac. 688; *Id.*, 3 Wash. Terr. 543, 18 Pac. 76; *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270, 20 L. Ed. 571; *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403. The negligence of a parent cannot be imputed to the child in an action brought for the benefit of the child and not for the benefit of the parent. *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 611; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64. There can be no imputed negligence when a person riding in a vehicle has no control of either team or driver. *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Follman v. Mankato*, 35 Minn. 522, 29 N. W. 317, 59 Am. Rep. 340; 7 Am. & Eng. Ency. Law (2d ed.), p. 488. The minor child may rely on the care of the parent, without being guilty of contribu-

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Citations of Counsel.

tory negligence. 16 Am. & Eng. Ency. Law (2d ed.), pp. 307, 309; 21 *Id.* 1049.

Graves, Kiser & Graves, for respondent, contended, *inter alia*, that in the absence of any statute or ordinance upon the subject no rate of speed is negligence *per se*. Elliott, Railroads, § 1160; *Custer v. Baltimore & O. R. Co.*, 206 Pa. St. 529, 55 Atl. 1130; *Parkerson v. Louisville & N. R. Co.*, 25 Ky. Law 2260, 80 S. W. 468; *New York etc. R. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130. The speed of the train was not the proximate cause. *The Clara*, 55 Fed. 1021; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. 849, 27 L. R. A. 365; *Bitting v. Maxatawny Township*, 177 Pa. St. 213, 35 Atl. 715; *Huber v. La Crosse City R. Co.*, 92 Wis. 636, 66 N. W. 708, 53 Am. St. 940, 31 L. R. A. 583; *Texas & Pac. R. Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Davis v. Chicago etc. R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 57 Am. St. 935, 33 L. R. A. 654; *Berry v. Borough of Sugar Notch*, 191 Pa. St. 345, 43 Atl. 240; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Rodgers v. Missouri Pac. R. Co.*, 75 Kan. 222, 88 Pac. 885, 121 Am. St. 416, 10 L. R. A. (N. S.) 658; *McClary v. Sioux City etc. R. Co.*, 3 Neb. 44, 19 Am. Rep. 631. The deceased was guilty of contributory negligence in not stopping to look and listen. *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997; 2 Thompson, Negligence, §§ 1641, 1656; *Phillips v. Detroit etc. R. Co.*, 111 Mich. 274, 69 N. W. 496, 66 Am. St. 392; *Sulder v. Pennsylvania R. Co. (N. J.)*, 56 Atl. 124; *Griffin v. Chicago etc. R. Co.*, 68 Iowa 638, 27 N. W. 792; *Merkle v. New York etc. R. Co.*, 49 N. J. L. 473, 9 Atl. 680; *Golinvaux v. Burlington etc. R. Co.*, 125 Iowa 652, 101 N. W. 465; *Colorado etc. R. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681; *Keyley v. Central R. Co.*, 64 N. J. L. 355, 45 Atl. 811; *Louisville etc. R. Co. v. French*, 69 Miss. 121, 12 South. 338; *Allen v. Maine Cent. R. Co.*, 82 Maine 111, 19 Atl. 105; *Cincinnati etc. R. Co. v. Howard*,

124 Ind. 280, 24 N. E. 892, 19 Am. St. 96, 8 L. R. A. 593; *Seefeld v. Chicago etc. R. Co.*, 70 Wis. 216, 35 N. W. 278, 5 Am. St. 168; *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504, 13 Am. Rep. 753; *Schaefert v. Chicago etc. R. Co.*, 62 Iowa 624, 17 N. W. 893; *Mantel v. Chicago etc. R. Co.*, 33 Minn. 62, 21 N. W. 853; *Haas v. Grand Rapids etc. R. Co.*, 47 Mich. 401, 11 N. W. 216; *Chicago etc. R. Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286; *Central R. Co. v. Smalley*, 61 N. J. L. 277, 39 Atl. 695; *Criss v. Seattle Electric Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Electric Co.*, 39 Wash. 386, 81 Pac. 830; *Davis v. Coeur d'Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839; *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 88 Pac. 1058; *Baker v. Tacoma Eastern R. Co.*, 44 Wash. 575, 87 Pac. 826; *Cooney v. Great Northern R. Co.*, 9 Wash. 292, 37 Pac. 438. The circumstances of the case did not excuse the deceased from stopping to look and listen. *Schofield v. Chicago etc. R. Co.*, 8 Fed. 488; *Hattcher v. McDermott*, 103 Md. 78, 63 Atl. 214; *Bush v. Union Pac. R. Co.*, 62 Kan. 709, 64 Pac. 624; *Durbin v. Oregon R. & Nav. Co.*, 17 Ore. 5, 17 Pac. 5, 11 Am. St. 778; *Judson v. Great Northern R. Co.*, 63 Minn. 248, 65 N. W. 447; *Toledo etc. R. Co. v. Jones*, 76 Ill. 311; *Smith v. Wabash R. Co.*, 141 Ind. 92, 40 N. E. 270; *Ward v. Richmond etc. R. Co.*, 43 Fed. 422; *Horn v. Baltimore etc. R. Co.*, 54 Fed. 301; *Blount v. Grand Trunk R. Co.*, 61 Fed. 375; *Reynolds v. Great Northern R. Co.*, 69 Fed. 808; *Pyle v. Clark*, 79 Fed. 744; *Louisville etc. R. Co. v. Webb*, 90 Ala. 185, 8 South. 518, 11 L. R. A. 674; *Little Rock etc. Co. v. Cullen*, 54 Ark. 431, 16 S. W. 169; *Glascock v. Central Pac. R. Co.*, 73 Cal. 137, 14 Pac. 518; *Mann v. Belt R. & Stock-Yard Co.*, 128 Ind. 138, 26 N. E. 819; *Oleson v. Lake Shore etc. R. Co.*, 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; *Hunter v. Montana Cent. R. Co.*, 22 Mont. 525, 57 Pac. 140; *Blackburn v. Southern Pac. R. Co.*, 34 Ore. 215, 55 Pac. 225; *Day v. Boston etc. R. Co.*, 97 Maine 528, 55 Atl. 420, *Barnhill v. Texas & Pac. R. Co.*, 109 La. 43, 33 South. 63; *Vincent v. Morgan's etc. R. Co.*,

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Citations of Counsel.

48 La. Ann. 933, 20 South. 207; *Brown v. Texas & Pac. R. Co.*, 42 La. Ann. 350, 7 South. 682; *Dascomb v. Baltimore etc. R. Co.*, 27 Barb. 221; *Salter v. Utica etc. R. Co.*, 75 N. Y. 278; *Brinker v. Michigan Cent. R. Co.*, 121 Mich. 283, 80 N. W. 28. A passenger in a vehicle driven by another is also in duty bound to stop, look and listen. *Brickell v. New York Cent. etc. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. 648; *Aurelius v. Lake Shore etc. R. Co.*, 19 Ind. App. 584, 49 N. E. 857; *Lake Shore etc. R. Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812; *Fechley v. Springfield Traction Co.*, 119 Mo. App. 358, 96 S. W. 421; *Dean v. Pennsylvania R. Co.*, 129 Pa. St. 514, 18 Atl. 718, 15 Am. St. 733, 6 L. R. A. 143; *Illinois Cent. R. Co. v. McLeod*, 78 Miss. 334, 29 South. 76, 84 Am. St. 630, 52 L. R. A. 954; *Township of Crescent v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 367; *Colorado etc. Co. v. Thomas, supra*; *Hoag v. New York etc. R. Co.*, 111 N. Y. 199, 18 N. E. 648; *Miller v. Louisville etc. R. Co.*, 128 Ind. 97, 27 N. E. 339, 25 Am. St. 416; *Cincinnati etc. R. Co. v. Howard*, 124 Ind. 280, 24 N. E. 892, 19 Am. St. 96, 8 L. R. A. 593; *Smith v. Maine Cent. R. Co.*, 87 Maine 339, 32 Atl. 967; *Meenagh v. Buckmaster*, 26 App. Div. 451, 50 N. Y. Supp. 85; *Thompson v. Pennsylvania R. Co.*, 215 Pa. St. 113, 64 Atl. 323; *Holden v. Missouri R. Co.*, 177 Mo. 456, 76 S. W. 973; *Brannen v. Kokomo etc. Gravel Road Co.*, 115 Ind. 115, 17 N. E. 202, 7 Am. St. 411; *Dryden v. Pennsylvania R. Co.*, 211 Pa. St. 620, 61 Atl. 249; *Chicago etc. R. Co. v. Bentz*, 38 Ill. App. 485; *City of Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315; *Missouri etc. R. Co. v. Bussey*, 66 Kan. 735, 71 Pac. 261; *Galveston etc. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *Hajsek v. Chicago etc. R. Co.*, 68 Neb. 539, 94 N. W. 609, 5 Neb. (Unof.) 67, 97 N. W. 327; *Louisville & N. R. Co. v. Molloy's Adm'x*, 28 Ky. Law 1113, 91 S. W. 685. It is the fact of immaturity, not of minority, that determines the degrees of care required. 1 Labatt, Master and Servant, § 20. A minor of the age of this daughter is charged with the duty to look

and listen. *Judson v. Great Northern R. Co.*, 63 Minn. 248, 65 N. W. 447; *Bush v. Union Pac. R. Co.*, 62 Kan. 709, 64 Pac. 624; *Central R. & Banking Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952; *Central R. & Banking Co. v. Golden*, 93 Ga. 510, 21 S. E. 68; *Tucker v. New York Cent. etc. R. Co.*, 124 N. Y. 308, 26 N. E. 916, 21 Am. St. 670; *Zlotovsky v. Twenty-third St. R. Co.*, 8 Misc. Rep. 463, 28 N. Y. Supp. 661; *Merryman v. Chicago etc. R. Co.*, 85 Iowa 634, 52 N. W. 545; *Carson v. Chicago etc. R. Co.*, 96 Iowa 588, 65 N. W. 831; *Shelley v. Austin*, 74 Tex. 608, 12 S. W. 753.

Root, J.—These two actions arose out of the same occurrence, and may be disposed of in one opinion. One was an action brought by Alma Cable, as administratrix of the estate of Rufus E. Cable, who was killed by a collision with the cars of the respondent at an interurban railway crossing, and the other was by Sadie Cable, a minor, brought by her guardian for injuries sustained at the time of said accident. Each case was withdrawn from the jury, and judgment of dismissal entered by the court.

The facts were about these: Respondent operates an electric railway between Spokane, Washington, and Cœur d'Alene, Idaho. Upon its line is a station known as Spokane Bridge, located eighteen miles east of Spokane. Rufus Cable lived near this station. On the day of the accident he was to take his daughter, appellant Sadie Cable, aged seventeen years, to this station, where she was to board the train of respondent for Spokane. The train which caused the accident is known as the "Flyer," and does not make stops at this station. On the day in question it was late, and a special had gone by somewhere near the time that the Flyer usually passed Spokane Bridge. Prior to the coming of the train, Cable and two daughters and another person were driving about the neighborhood in an open buggy. When the train was about half a mile from the station of Spokane Bridge, these people were in their buggy visiting with a neighbor

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about one-sixth of a mile from the crossing, which crossing is about one hundred and seventy-five feet west of the station. The train was coming from the east. Decedent and his party supposed it was a local train which made stops at this station, and they immediately drove toward the station in order that the young lady might board the train. They drove at a brisk trot until the horse was nearly to the track, when it slowed into a walk, and at this moment reared and, as it came down, struck against the side of one of the three cars of the train, which at that moment dashed by. Rufus Cable received injuries from which he died next day, and the appellant Sadie Cable was seriously injured.

Appellants claim that the people in the buggy supposed the train to be the local, and that it would stop at the station. Sadie Cable testifies that she looked when they were some distance from the crossing, and did not see the train coming. There was evidence of the presence of certain freight cars upon the side track, and of certain buildings, cord wood, and small trees which, to a certain extent, obscured the view. The evidence showed, however, that all these parties knew that the train was coming and that, if the horse had been stopped shortly before reaching the track, they could have both heard and seen the approaching train.

It is contended by appellants that respondent was negligent in running its train at too high a speed, and in not whistling or sounding bells or otherwise giving suitable warning of its approach. There was considerable conflict in the evidence as to these matters, but assuming that the railway company was negligent, we will take up the question of contributory negligence, which formed the basis of the trial court's action in dismissing the cases. From the evidence introduced by appellants we can see no escape from the conclusion that the decedent and his daughter, one of the appellants herein, were chargeable with contributory negligence. It is the rule in this as in most states that a person about to cross the track

of a steam railway must stop, look and listen, unless the conditions be such that to do so would avail nothing. The observations and experience of mankind with reference to this class of accidents have led the courts to announce and observe this rule as an appropriate measure of the degree of care and prudence necessary to relieve a person from the charge of negligence, when about to go upon so dangerous a place as the crossing of a railway. We think the same rule applies to an interurban electric railway upon which trains are customarily operated at a high speed. These people did not stop before crossing the railway track. Had they done so shortly before reaching the crossing, they could plainly have seen and heard the approaching train. If they looked or listened, it was not at a time or place where looking or listening revealed to them the true condition of affairs. If, as contended by appellants, there were box cars or other obstructions which obscured the view until decedent and companions were within a short distance of the track, it would seem that this fact should have impressed them with the greater necessity of stopping to look and listen before emerging from behind said obstructions and going upon the track, especially as they had already seen the train coming. It seems to us that this deplorable catastrophe was a result of the people in the buggy taking it for granted that the train was to stop at the station, when as a matter of fact it was a train that did not make stops at said station and passed through on this occasion as on all others, without stopping.

There is a suggestion that the appellant Sadie Cable is not chargeable with contributory negligence, even though her father may have been, inasmuch as she was not driving the horse and had no control thereover. Ordinarily where one rides in a vehicle with the driver thereof and is injured by the negligence of a third person, to which negligence that of the driver contributes, this contributory negligence is not imputable to the passenger, unless said passenger has, or is in a position to have and exercise, some control over the driver

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with reference to the matter wherein he was negligent. We are not disposed to impute to appellant Sadie Cable the contributory negligence of her father; but she being of years of discretion was subject to the general rule of "stop, look and listen" heretofore announced, and in the absence of a showing that she endeavored to stop the horse or have her father do so or to do anything for her protection equivalent thereto, and in the absence of any evidence tending to show a purpose, intention, or attempt on her part to take any such precaution, or that she was prevented or without fault on her part induced from so doing, we see no way by which she may escape the operation of the rule.

The judgment of the superior court is affirmed.

FULLERTON, CROW, RUDKIN, and DUNBAR, JJ., concur.

No. 7326. Decided October 16, 1908.]

JOSEPH BOUCHER, *Respondent*, v. OREGON RAILROAD &
NAVIGATION COMPANY, *Appellant*.¹

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OPERATION OF TRAINS—FAILURE TO OBSERVE RULES. Where a freight train was overtaken and run into by another train, the conductor of the first train is guilty of contributory negligence, precluding any recovery for injuries sustained in the collision, where it appears conclusively that his train was delayed, that he failed to observe the rules of the company for the protection of his train under the circumstances of the case, either in spirit or letter, and that had he done so the accident would not have occurred.

APPEAL AND ERROR—REVIEW—VERDICT. The verdict of a jury is not binding on questions of fact where it is not consistent with the special findings and such findings are not consistent with themselves.

SAME—SPECIAL FINDINGS—CONSISTENCY—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OPERATION OF TRAINS. In an action by a conductor for injuries sustained in a rear end collision, a special finding of the jury that his train was delayed in the run from W. to R. under circumstances which should have caused him to appre-

¹Reported in 97 Pac. 661.

hend that it might have been overtaken by another train, is inconsistent with a special finding that the speed of the train was not so reduced running up grade from S. to K. as to endanger his train and the circumstances were not such "during any part of this run between such points" as should have caused him to take certain precautions, the same being prescribed by the rules of the company under the circumstances found by the first special finding; and a general verdict inconsistent with the first finding will not be sustained when contrary to the undisputed testimony as to the conductor's negligence in not observing the precautionary rules.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 30, 1907, upon the verdict of a jury rendered in favor of the plaintiff, for injuries sustained by a railroad conductor in a rear end collision. Reversed.

W. W. Cotton, S. R. Stern, A. C. Spencer, and Ralph E. Moody, for appellant.

Geo. A. Latimer and A. M. Winston, for respondent.

DUNBAR, J.—On the 11th day of December, 1906, while the plaintiff was in the employ of the defendant railroad company as freight conductor, he left Wallula with a loaded freight train, westbound for Umatilla, in the state of Oregon. Proceeding westbound, he encountered a stiff upgrade a few miles east of the station known as Riverview. His train was known as No. 21, and was due in Umatilla at 3:05 p. m. Extra tonnage on this route was handled by an extra train, which was operated in connection with No. 21, and known as No. 131. Defendant in this action William Davidson was conductor on said extra train No. 131, and defendant M. C. Wade was the engineer on said train. As No. 21 was approaching the whistling post east of the station Riverview, its rear end was run into by No. 131, and as a result of said collision the plaintiff sustained the injuries for which he has sued.

Defendant Wade did not appear in the court below, and was dismissed out of the action by plaintiff's attorneys, and

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at the conclusion of plaintiff's case, a nonsuit was granted as to the defendant Davidson, the action having been originally brought against the Oregon Railroad & Navigation Company and Wade and Davidson. The complaint in substance alleged negligence on the part of the defendant railroad company in not furnishing a safe place and keeping a safe place for the plaintiff to operate his train in. The answer denied negligence on the part of the railroad company, alleged the promulgation of rules to govern conductors in the operation of their trains under such circumstances as it alleged to exist in this case, and alleged contributory negligence on the part of the plaintiff in not observing such rules, and that the failure to observe such rules was the cause of the accident. Verdict was rendered for the plaintiff in the sum of \$5,000, and judgment entered, from which judgment this appeal is taken.

The respondent objects to the hearing of the case upon its merits for several technical reasons, but we think under the law and decisions of this court the cause is here for its decision upon the merits. Many assignments of error are made by the appellant, but as we view the true merits of this case, their discussion is unnecessary, for it appears without any reasonable doubt that the accident occurred by reason of the failure of the conductor to observe the rules which had been furnished him for his guidance. Rule 99 is to the effect that:

"When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals; at a point one-fourth of a mile (nine telegraph poles) from the rear of his train he must place one torpedo on the rail, then continue to go back at least one-half mile from the rear of his train and place two torpedoes on the rail, two rail lengths apart, when he may return to a point one-fourth of a mile from the rear of his train and must remain there until relieved or recalled by the whistle of his engine. When he returns to his train he will remove the single torpedo. Should the speed of the train be reduced and its rear thereby endangered, making it necessary to check the following train before a flagman can

get off, a lighted red fuse shall be thrown on the track at intervals to secure the absolute safety of the leading train. By night or when the view is obstructed by fog or otherwise, flagmen must place a lighted red fuse on the track to assist in protecting his train, while returning.

"106. In all cases of doubt or uncertainty the safe course must be taken and no risks run.

"901. The general direction and government of a train is vested in the conductor. He is responsible for its safe and proper conduct, and all men employed on the train will obey his instructions. . . . Be vigilant and cautious, not trusting alone to signals for rules for safety. Will obey the instructions of yardmaster within yard limits, and be governed by the directions of agents in doing work at stations.

"905. Conductors must not allow other duties to interfere with the proper protection of their train, and invariably require their flagmen to act with the utmost promptness and in strict accordance with the rules.

"909. When compelled for any reason to move at an unusually slow speed, or to stop on the main track, conductors must take immediate action to secure the safety of their own train and trains approaching. Constantly keep in mind that nothing will justify a collision between trains, and that the prompt use of signals according to the rules will prevent it."

There are other rules which were introduced in evidence, used for the protection of trains, but sufficient has already been set forth. The evidence shows and the jury found that the caboose, which was attached to the rear end of the train, was not within the yard limits at the time of the collision. The evidence also shows conclusively that the train was delayed. In fact, this is shown by the time of the accident and the time when the train was due at Riverview. While it is true the conductor in an evasive way testified that he had complied with a portion of the rules, it conclusively appears from his own testimony that he did not comply with the rules, either in spirit or in letter, and it as conclusively appears that, if he had complied with the rules, the accident would not and could not have occurred.

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While as a rule this court will be bound by the verdict of a jury on questions of fact, but where the verdict is not consistent with the special findings and the special findings are not consistent with themselves, this rule will not prevail. The jury in answer to special interrogatory No. 1, which was as follows: "Was train No. 21 delayed in her run from Wallula to Riverview under circumstances which should have caused conductor Boucher to apprehend that it might have been overtaken by another train?" answered: "Yes." Special interrogatory No. 2 was: "Was the speed of train 21 so reduced running up grade from Sand Spur to Riverview as to endanger train 21, and were the circumstances such during any part of this run between such points as should have caused Boucher in the exercise of due care to have thrown lighted fuses at intervals on the track or thrown torpedoes to protect the rear of his train?" and the answer was: "No." This is in reality not a finding of fact, but it is a conclusion which the jury had no right to draw from the preceding finding that the train was delayed under circumstances which should have caused the conductor to apprehend that it might have been overtaken by another train. These are the circumstances under which the rule prescribes that the conductor should throw out lighted fuses at intervals on the track, and throw out torpedoes to protect the rear of his train; and when the jury answered that these conditions existed, they could not consistently say that the circumstances were such as to relieve the conductor of the duty prescribed by the rules. As the general verdict must have been based upon the answer to interrogatory No. 2, the general verdict is inconsistent with the answer to interrogatory No. 1; and the jury having found that the rear end of the train or the caboose was not within the whistling post, and therefore was in a position which should have been protected under the rules, not having been within the yard limits, their general verdict was doubly inconsistent; and the testimony, not only for the defense but for the plaintiff, shows that the jury was war-

ranted in answering interrogatory No. 1 as it did answer it, and that the train was delayed under such circumstances as should have caused the conductor to apprehend that it might have been overtaken by another train.

Courts are jealous of the rights of passengers, and of the servants of railroad companies who are subject to the orders, and under the absolute control, of the railroad company or its vice principals. But a different rule prevails when damages are sought from the company by a servant who is in control for the company. A conductor is an important factor in the operation of a train, and if the accident happens through mismanagement so far as the operation is concerned, or through neglect of orders, it would be unjust to hold the principal responsible and allow the servant to recover damages which were the result of his own negligent acts. When the master has promulgated a rule, which if followed would protect the conductor in the exercise of his duties and which would have prevented the accident, it would be rank injustice to allow the conductor to escape the consequences of his own negligence and shift the responsibility upon the master. The undisputed evidence in this case so plainly and undeniably shows the negligence of the conductor in failing in letter and in spirit to obey the rules which were made for his guidance, that he cannot recover under any authority.

The judgment will therefore be reversed, with instructions to dismiss the action.

HADLEY, C. J., ROOT, MOUNT, and CROW, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

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[No. 7125. Decided October 16, 1908.]

VINCENZO DIMURIA, *Respondent*, v. SEATTLE TRANSFER
COMPANY, *Appellant*.¹

APPEAL AND ERROR—DECISION—TRIAL—WAIVER OF NONSUIT. The waiver of a nonsuit by proceeding with the trial, after exception taken, only allows the plaintiff the benefit of evidence thereafter introduced; and where the defects in plaintiff's case are not cured thereby, the nonsuit may, on proper assignment of error, be granted on appeal.

MUNICIPAL CORPORATIONS—STREETS—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pedestrian who was run down by a team at a street crossing is guilty of contributory negligence, as a matter of law, precluding any recovery, where it appears that he held an umbrella over his head in such a position as to prevent his seeing the approaching team, and that neither before or while crossing the street did he look in either direction for teams or vehicles, and was not looking around, and that if he had looked around he could have seen the team.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 3, 1907, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a pedestrian run down by a team at a street crossing. Reversed.

Kerr & McCord, for appellant.

Joseph M. Glasgow, for respondent.

CROW, J.—Vincenzo Dimuria commenced this action against Seattle Transfer Company, a corporation, to recover damages for personal injuries. From a judgment in his favor, the defendant has appealed.

The respondent alleged, that on November 13, 1906, at the hour of 6:50 a. m., he was walking on Jackson street, near its intersection with Third avenue, in the city of Seattle, crossing the same in front of the entrance of the drive-

¹Reported in 97 Pac. 657.

way of the Union depot; that the appellant was the owner of a vehicle and team of horses then being driven along Jackson street by one of its servants, who so negligently and recklessly managed the team as to run over the respondent and do him bodily injury. The appellant, with other affirmative defenses, pleaded that the injuries sustained by respondent were caused solely by his own carelessness and negligence. At the close of respondent's evidence, the appellant moved for a nonsuit, and now insists that the trial court erred in denying its motion.

The rule of practice in this state is that, by proceeding with its evidence, the appellant waived its motion for a nonsuit. If, however, at the time the motion was interposed and denied, the proofs were insufficient to sustain a verdict for respondent, the appellant's waiver only went to the extent of allowing the respondent the benefit of any evidence thereafter introduced. *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264. If, on consideration of such additional evidence, it appears that the defects in respondent's case have not been cured, the motion without any renewal thereof may, on a proper assignment of error, be sustained and a nonsuit granted on appeal. *Matson v. Port Townsend Southern R. Co.*, 9 Wash. 449, 37 Pac. 705.

In now passing upon appellant's contention that the nonsuit should have been granted and that the trial court erred in denying the same, we must consider all the evidence admitted during the trial. Appellant, in support of its motion, insists that the respondent was guilty of contributory negligence to such an extent as to prevent a recovery by him. The evidence, without conflict, shows that, while the respondent was crossing the public street he carried an umbrella over his head, which he held in such a position as to prevent him from seeing the approach of appellant's team, that he did not look around, that he failed to observe the approach of any teams, but proceeded on his way without giving any at-

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tention to his surroundings. On cross-examination he testified as follows:

"Q. You had an umbrella over your head, did you? A. Yes. Q. You did not look around at all when you made the crossing from Third avenue over to the entrance of the depot; you never looked around at all, did you? A. No sir; I was not looking around. I had an umbrella. Q. And you walked right straight ahead to your home? A. Yes, walking straight home. Q. Was not thinking of carriages or horses, were you? A. No sir; was not thinking of them. Q. Never thought anything about any street cars or wagons, or automobiles, or anything at all. Just went right straight home? A. No sir, I was not thinking of them. . . . Q. If you had looked around on the day you were hurt, you could have seen this carriage, if you had been looking around? A. No, I was not looking around. Q. Well, if you had been looking around you could have seen the carriage, couldn't you? A. I was not looking around. Q. Well, if you had looked around you could have seen these horses coming towards you, couldn't you? A. Yes, certainly, if I had looked around; of course."

Two of respondent's witnesses testified that they were crossing the street a short distance behind him; that appellant's team passed them before it reached him; that they saw it approaching; that they avoided being struck, although the horses were traveling at a reckless rate of speed; that after the vehicle had passed them, it struck the respondent who was crossing the street, was walking from the team, holding an umbrella over his head, and not looking around. There is no evidence that the respondent, before or while crossing Jackson street, looked in either direction for teams or vehicles, or that he took any precautions for his own safety. It was just as much his duty to do this as it was the duty of the driver to exercise care in avoiding accidents. Pedestrians and teams have not any superior rights the one over the other at street crossings. They each have a common right to use the street, and in its exercise are equally bound to employ care for their personal safety. *Barker v.*

Savage, 45 N. Y. 191, 6 Am. Rep. 66; *Borg v. Spokane Toilet Supply Co.*, ante p. 204, 96 Pac. 1037.

From all of the evidence we are compelled to hold that the respondent was guilty of contributory negligence, as a matter of law, in failing to look for approaching teams or to take any other precaution for his personal safety; that the trial court erred in denying appellant's motion for a nonsuit; that the defect in respondent's case was not cured by evidence subsequently admitted; and that the appellant is now entitled to have its motion granted on this appeal.

The appellant has made other assignments of error based upon instructions given which would entitle it to a reversal, but as an order of dismissal will be entered, it is not necessary to discuss them in this opinion.

The judgment is reversed, and the cause remanded with instructions to grant a nonsuit and dismiss the action.

ROOT, MOUNT, and RUDKIN, JJ., concur.

HADLEY, C. J., and FULLERTON, J., took no part.

[No. 7535. Decided October 21, 1908.]

GEORGE S. HOPKINS *et al.*, Respondents, v. C. E. CRANE
et al., Appellants.¹

APPEAL—HARMLESS ERROR—PLEADINGS—DEFINITIONS. It is not prejudicial error to deny motions to make a complaint more definite and certain as to items of damages claimed where the allegations were reasonably comprehensive and were supplemented by a bill of particulars furnished upon demand.

CHATTEL MORTGAGES—FORECLOSURE—ACTIONS—JURISDICTION—DETERMINATION OF AMOUNT. In an action to foreclose a mortgage given to secure the plaintiff against loss by breach of a contract, it is not necessary that damages from the breach be ascertained before suit brought, jurisdiction to foreclose necessarily including the determination of the amount for which foreclosure be awarded.

¹Reported in 97 Pac. 772.

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SAME—PARTIES LIABLE—PERSONAL JUDGMENT. In an action to foreclose a mortgage securing a contract, against a party to the contract and one claiming an interest in the property, a joint personal judgment cannot be entered against both defendants.

APPEAL—COSTS—RECORD—SUPPLEMENTAL RECORD TO CURE ERROR OF CLERK. When, by a supplemental record, the clerk of the lower court certifies to a new copy of the judgment appealed from, showing a personal judgment against only one of the defendants, and that there was an inadvertent mistake in certifying the first copy on appeal, which showed personal judgment against both defendants, there is in fact but one judgment as indicated by the corrected transcript; but if, as claimed, there are two inconsistent judgments, the erroneous one should be vacated without costs to appellants, the point not having been urged below.

Appeal from a judgment of the superior court for Thurston county, Chapman, J., entered February 18, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action for damages and foreclosing a chattel mortgage given to secure the same. Affirmed.

Ellis, Fletcher & Evans and *Vance & Mitchell*, for appellants.

Troy & Falknor, for respondents.

HADLEY, C. J.—This is an action to foreclose a chattel mortgage, given to secure the performance of a contract and especially to secure the plaintiffs for all damages resulting to them from a failure of the defendant Crane to purchase meats, as provided in the agreement. The contract was in writing and was made a part of the mortgage, the execution thereof bearing date June 26, 1905. It provided, among other things, that the defendant Crane, or his assigns, should, for the period of three years, purchase, and continue to purchase, from the plaintiffs and for the Palace meat market, in Olympia, Washington, which Crane agreed to continue in business, all dressed beef and mutton which Crane or his assigns should use in carrying on the business of said meat market. Crane was to pay the plaintiffs such

prices as should be quoted by the packing houses of Seattle and Tacoma, based upon steady market quotations, and not upon such as should arise from any meat war. It was also agreed that the meats which should be furnished by the plaintiffs should be the same as those for which the market quotations are given in Seattle and Tacoma, and Crane should have the right to reject any and all inferior meats.

The complaint avers that the plaintiffs have at all times complied with the terms of the contract and mortgage, and that they now stand ready to continue to observe and fulfill in the future all the terms and conditions thereof; that the defendant Crane, from about the 23d day of October, 1905, has continuously operated said Palace meat market, but has failed and neglected from said date to purchase meats from the plaintiffs, as provided by the contract; that he failed and refused, between October 23, 1905, and January 29, 1906, to deliver to plaintiffs any orders for meats whatever, though he was advised that at all times the plaintiffs stood ready and willing to furnish the same as the agreement provided; that on or about January 29, 1906, and from that time until about February 7, 1906, he delivered orders and the plaintiffs immediately filled them by delivering at the said meat market the meats of the quantity and quality required by the orders and by the agreement, but the defendant refused to receive them; that since the last named date he has failed and refused to give to the plaintiffs any orders whatever for meats. Damages for the breach of the contract are claimed as resulting from the fact that the location of plaintiffs' slaughter house, with reference to the markets, was such as made them unable to dispose of the meats to any one else, which conditions were known to Crane. A foreclosure of the mortgage to satisfy the damage is prayed. The defendant Carstens Packing Company was made a defendant by reason of some claim which it asserts against the mortgaged property.

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The defendant Crane admits the giving of the orders and the refusal to accept the meats delivered, and alleges that the meats were not offered at the prices quoted by the packing houses of Seattle and Tacoma; that the prices asked by plaintiff were much above the prices asked by the Carstens Packing Company for good, wholesome inspected meat, and that the defendant, acting within his rights under the contract, rejected the meats both because of the price and because of inferior quality. He denies other material allegations of the complaint, and says that the plaintiffs have not been damaged. The cause was tried by the court without a jury, and resulted in a judgment against the defendant Crane in the sum of \$1,165, and a decree was entered foreclosing the chattel mortgage to satisfy the judgment, and also decreeing that the plaintiffs' rights in the mortgaged property are superior and prior to any rights of the defendant Carstens Packing Company. Both defendants have appealed.

It is assigned that the court erred in denying the separate motions of the appellants to make the complaint and supplemental complaint more definite and certain as to the allegations concerning the damages. We think no prejudicial error resulted from the denial of the motions. The allegations as to damages were reasonably comprehensive and, in any event, these were supplemented by itemized bills of particulars furnished on the demand of the appellants. We think the appellants were thereby sufficiently informed as to the damages claimed.

It is also contended that it was error to overrule the separate demurrers of the appellants to the complaint and supplemental complaint. We do not find that any specified ground of demurrer is well taken. We do not discover any nonjoinder of parties, and we find that the contract is a mutual one. A breach of the contract by appellant Crane is alleged, resulting in damage to respondents. These facts appearing, a cause of action was stated which was sufficient

as against demurrer. It was not necessary that the damages arising from the breach of the contract should be ascertained prior to bringing the suit to foreclose the mortgage. The mortgage was given as security for the enforcement of the contract and the court had jurisdiction to entertain an action to foreclose, which necessarily included the determination of the amount for which foreclosure should be awarded.

It is insisted that the court erred in its findings of facts. We find substantial evidence supporting the findings, and we believe they should not be disturbed. The facts were found much as alleged in the complaint, except as to the extent of the damages, the amount of the damages found to be substantially less than the sum demanded in the complaint and supplemental complaint taken together.

The complaint is made in appellants' brief, and the same contention was made at the oral argument, that the court erred in entering a joint personal judgment against both of the appellants. It is insisted that it was in no event proper to enter a personal judgment against the appellant Carstens Packing Company, and that the judgment must be reversed for that reason, if for no other. The contention that no personal judgment should go against the Carstens Packing Company is undoubtedly correct, but as the entire record is now made to appear before us, there was no such judgment entered. The original transcript as filed in this court does show what purports to be a personal judgment against "the defendants," but a supplemental transcript subsequently filed by the respondents shows such a judgment against appellant Crane only. To the supplemental transcript is attached a certificate of the clerk of the superior court to the following effect:

"I, W. M. Nunn, County Clerk and ex-officio Clerk of the Superior Court of the State of Washington, for Thurston County, holding sessions in Olympia, do hereby certify that the foregoing is a full, true and correct copy of the original Judgment of the above entitled cause as the same appears on

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file in my office and of record in Journal Vol. 25 at page 138 of the Superior Court records, for Thurston County, Washington.

"I further certify that in certifying the copy of the Judgment in this cause as the same is certified to in appellants' transcript on appeal to the Supreme Court of the State of Washington, a mistake was inadvertently made in comparing said copy and the same as it appears in said transcript is not an exact, true and correct copy of the original Judgment in this cause."

Under the terms of the above certificate there is, in fact, but one entry of judgment, and that shows a personal judgment against appellant Crane only, the decree simply declaring with reference to appellant Carstens Packing Company that its interest in the mortgaged property is inferior to the lien of respondents' mortgage. It was suggested in good faith at the oral argument that two entries of judgment had been made, and that they are inconsistent in the particular mentioned. The two forms of entry appearing in the original and supplemental transcripts would so indicate, but the clerk's certificate negatives such contention. If there is to be found in the record such a judgment entry as that shown in the original transcript, it should be vacated, but without costs against the respondents, as the point does not appear to have been raised by appellants in the court below. The judgment as shown in the supplemental transcript is, however, affirmed, and the case is remanded with instructions to vacate the other judgment entry, if such exists. Otherwise the order here is for an ordinary affirmance of the judgment.

RUDKIN, DUNBAR, ROOT, MOUNT, and CROW, JJ., concur.

[No. 7595. Decided October 21, 1908.]

CHARLES H. SPRINGER, *Appellant*, v. ROBERT AYER, *as Receiver of John H. Saunders et al., Respondent*.¹

RECEIVERS—ACTIONS—PLEADINGS—PARTIES—RIGHT TO INTERVENE—REPRESENTATION OF CREDITORS. Where an action is brought against the receiver of an insolvent, to recover property of the insolvent, and the receiver defends for the benefit of creditors, a complaint in intervention on behalf of certain creditors is demurrable as showing no right to intervene, where it sets up the same claims made on their behalf by the receiver in an answer filed in their interest and in the interest of all creditors who file their claims; since the receiver represents the creditors.

COSTS—PERSONS ENTITLED—INTERVENERS. Persons improperly intervening are not entitled to costs from the insolvent's estate.

FRAUDULENT CONVEYANCES—SALES—CONDITIONAL SALES—SUBSEQUENT BONA FIDE PURCHASERS. Where the vendor, in a conditional sale, delivers possession to the vendee and fails to file in the auditor's office a memorandum of the sale, as required by Laws of 1903, p. 6, the sale becomes absolute as to subsequent creditors in good faith.

REPLEVIN—ALTERNATIVE JUDGMENT—AMOUNT—FRAUDULENT CONVEYANCES. In an action of replevin against a receiver, where it appears that he was entitled to possession so far as he represented subsequent creditors in good faith, it is error to enter judgment in the alternative for the total amount of the claims of all creditors, in case return of the property to the receiver cannot be had, but the judgment must be reversed with directions to determine the amount of the claims of creditors entitled to the possession, in order to limit the alternative money judgment to such sum.

BANKRUPTCY—COURTS—JURISDICTION—RECEIVERS. After the appointment and qualification of a receiver in a state court, the appointment of a trustee in bankruptcy by the Federal court does not deprive the state court of jurisdiction, or the receiver of the right to possession of the property.

COSTS—PARTIES ENTITLED. Where a trustee in bankruptcy claims property in the hands of a receiver appointed by the state court, and is denied the relief asked, it is error to award the trustee costs as against the insolvent's estate.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered March 31, 1908, upon findings

¹Reported in 97 Pac. 774.

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in favor of the plaintiff, after a trial before the court without a jury, in an action of replevin. Reversed.

Geo. H. Funk, for appellant.

E. N. Steele, for appellant interveners.

Byron Millett, for respondent.

HADLEY, C. J.—This is an action for the possession of personal property, including a donkey logging engine, and certain rigging and tools in connection therewith, together with wire cable, and some other items of smaller consequence. The suit was brought by the plaintiff, Charles H. Springer, against Robert Ayer, as receiver of the effects of John H. Saunders. The complaint alleges, that about January 5, 1907, the plaintiff made a conditional oral contract of sale of the property to Saunders, by the terms of which Saunders was to pay the plaintiff \$2,000 on or before April 5, 1907, and it was agreed that Saunders was to acquire no title to the property until he had made full payment of the purchase price; that it was also agreed that, if he failed to make full payment within the time mentioned, he should forfeit all payments theretofore made; that he paid within the time the sum of \$500, and no more, and that by reason of the facts stated the payment has become forfeited and the plaintiff is entitled to the possession of the property; that the defendant Ayer, as receiver of the property and effects of Saunders, took possession of the chattels mentioned, and still maintained the same at the time this action was begun. The value of the property is fixed in the complaint at \$1,500, and judgment for possession or for the recovery of the value is demanded. The plaintiff having given the necessary bond, took immediate possession at the commencement of the action.

The receiver answered, admitting his possession, averring his right thereto, and denying the plaintiff's right to possession. He alleged that in no event did the plaintiff sell to Saunders the twelve hundred feet of 7/8-inch wire cable, the

three chokers, and the float house, all described in the complaint, but that the same were, at all times mentioned, the property of Saunders. He also alleged that, if the plaintiff sold the remaining property to Saunders, as alleged in his complaint, such sale was void as to the creditors of Saunders, whom the receiver now represents; that the plaintiff and Saunders were at all times bona fide residents of Thurston county wherein, during all of said time, the property was located and in the possession of Saunders as vendee, and afterwards of the defendant as receiver of Saunders' effects; that, during the time the property was in the possession of Saunders, he became indebted to divers persons who are interested in the receivership proceedings and in the assets involved therein; that among such creditors are two who sold and delivered to Saunders goods and merchandise of the value respectively as follows: Ramberg, \$663.70; Lansdale, \$89.75; that the credit for such merchandise was given on the faith and with the belief on the part of said creditors that Saunders owned the property mentioned absolutely free and clear of all liens and incumbrances; that there are other creditors of Saunders similarly situated with reference to the receivership proceedings, whom the receiver is not now prepared to name, all of whom are subsequent creditors of Saunders, in good faith; that no memorandum of any sale from the plaintiff to Saunders, stating its terms and conditions, signed by the vendor and vendee, or otherwise, was filed in the auditor's office of Thurston county, within ten days or at any other time after the vendee Saunders took possession of the property.

The alleged creditors Ramberg and Lansdale mentioned in the receiver's answer applied to the court for leave to intervene in this cause, and were joined by A. H. Chambers. Leave to intervene was granted. Practically the same facts were alleged by Ramberg and Lansdale as were alleged in the receiver's answer concerning their claims. The complaint in intervention further alleged, in behalf of Chambers, that he

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sold goods to Saunders of the value of \$208, under the same circumstances as those which induced Ramberg and Lansdale to make their sales. The relief asked by the interveners is that they be declared in this action to be creditors of Saunders subsequent to the purchase by him of the donkey engine, that the sale to him shall be declared absolute as to the interveners, and that they shall be declared to be preferred creditors as to said property or as to the proceeds arising therefrom.

A supplemental complaint was also filed, alleging that Saunders had been declared a bankrupt in the United States district court for the western division of the western district of Washington. The date of the adjudication in the bankruptcy court was subsequent to the appointment and qualification of the defendant Ayer as receiver in the state court. It was shown that James McDowell was appointed and qualified as trustee in bankruptcy, and he was made a party defendant in this action. He answered, setting up the same defense as that made by the receiver, that the sale by plaintiff to Saunders became absolute as to subsequent creditors in good faith. As trustee in bankruptcy, he also demanded the possession of the property, or its value in case the return thereof cannot be had.

Issues were joined by the plaintiff upon the several answers and the complaint in intervention, and a trial was had before the court without a jury, resulting in a judgment to the following effect: That, inasmuch as the property had been delivered to the plaintiff pending the action, it was adjudged that the receiver Ayer should recover the property and its possession, and in case a return or delivery cannot be had, then the receiver shall recover from the plaintiff \$1,740, as the value of the property, together with his costs. It was also adjudged that the interveners shall recover their costs against the plaintiff, that the trustees in bankruptcy shall take nothing against the receiver, and that he shall recover his costs against the plaintiff. The plaintiff has appealed, and the interveners have also joined in a separate appeal.

Referring first to the appeal of the interveners, the appellant Springer assigns as error that the court overruled his demurrer to the complaint in intervention of Ramberg, Lansdale and Chambers. We think the assignment is well taken. The receiver in his answer had set up the same facts in behalf of Ramberg and Lansdale, and stated that there were other creditors similarly situated for whom he acted. This necessarily included Chambers and any others similarly situated. The receiver represents the creditors, and it is his duty to guard the interests of all of them when he is advised what the interests are. This was an action against the receiver for possession of certain property. He resisted it, and claimed possession especially in the interest of these interveners and all others who would file their claims with him advising him of similar rights. Under such circumstances, there was no necessity of putting the appellant Springer to the cost of the intervention when he was litigating the same questions with the receiver who represented the interests of the interveners. If these creditors may intervene on the mere claim that they have a special or preferential interest in the property as creditors of the receivership estate when the receiver is already acting in their behalf, then we see no reason by analogy why any common contract creditor may not in any case intervene on the claim that he is interested in the property of any estate. In *Churchill v. Stephenson*, 14 Wash. 620, 45 Pac. 28, it was held that such a creditor may not intervene in an action brought against an administrator by the widow of the deceased to recover possession of certain real estate claimed by the widow as her separate property. Such latitude for intervention would lead to unnecessary costs and to useless confusion and multiplicity of parties. The whole matter is simplified by the action of the receiver, who acts in the representative capacity. The interveners were granted a judgment against the appellant Springer for their costs. They appealed on the ground that they were denied an adjudication in this action that the return of possession to the re-

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ceiver shall be subject to their claims in the specified sums mentioned. Their appeal must fail, and it is dismissed for the reasons above stated, showing that they are not properly parties here. The judgment for costs in their favor is reversed for the same reasons.

Appellant Springer assigns error upon the court's findings of facts. We think the evidence shows that Saunders, as Springer's conditional sale vendee, was in possession of the property at the time the creditors named extended their credit to Saunders, and that the credit was in each instance extended in good faith, relying upon the belief that Saunders was the absolute owner of the property. Springer, as the conditional sale vendor, neglected to file in the auditor's office of the county a memorandum of the sale showing its terms and conditions as provided by chapter 6, Laws of 1903, p. 6. In accordance with that statute, the sale to Saunders therefore became absolute so far as the rights of the aforesaid subsequent creditors in good faith are concerned. The evidence shows that Saunders had forfeited his rights under the conditional sale contract before the receiver took possession, but the possession nevertheless remained with Saunders during all the time the credit was extended, and the judgment of the court awarding the possession of the property to the receiver was upon the theory that the particular creditors mentioned by the receiver in his answer, and possibly others to whom he refers but whom he does not name, have an interest in the property as creditors of Saunders by reason of the statute cited.

We think the judgment awarding return of possession to the receiver was right, but the money judgment to be recovered in the event the property is not returned is for \$1,740, while the aggregate extent of all claims entitled to the protection of the statute aforesaid which were brought to the attention of the court, is \$961.45. Springer contends that in no event should the alternative money judgment be for more than the above named sum. The court, however, found, and

we think correctly under the evidence, that Springer did not at any time have any ownership in or right to the possession of the twelve hundred feet of $\frac{7}{8}$ -inch cable, the value of which was found to be \$240; that the same was not included in the conditional sale, but that Saunders was at all times the absolute owner thereof for all purposes. The receiver is, therefore, in any event, entitled to a judgment for the return of the cable and to a further judgment for \$240 in the event it cannot be returned. This sum becomes mere common general assets in the hands of the receiver. If the \$240 is not needed to satisfy other creditors of a common and general character, then the money judgment in favor of the receiver should be for such sum only, in addition to the \$240, as shall, in the aggregate, be sufficient to cover the claims, including necessary costs, of all creditors who are entitled to the protection of the statute of 1903, including those named in this record and the others, if any, who are described in the receiver's answer as being similarly situated. If no others are found to be similarly situated, and if there are no general creditors who may rightfully demand the \$240, or any part thereof, then the judgment should be limited to a sum merely sufficient to cover the claims, including necessary costs, of the creditors actually named in this record who are favored by reason of the statute of 1903.

It is manifest from what has been said that this court cannot determine from the record now before it how much should be awarded as the money judgment. The relative rights of the parties are out of the ordinary in an action for mere possession. The receiver has no greater interest in the property conditionally sold by Springer than will be sufficient to protect the particular creditors who are favored by the statute, and Springer should therefore not be required to respond to a judgment for a greater sum. We think the cause must therefore be remanded to the superior court for the purpose of further trial to be confined to proof of the facts indicated above as necessary to be determined in order to fix the amount

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of the money judgment. This can be easily done, as the same court controls both the receivership and this case, and substantial justice may thus be done to all concerned.

Appellant Springer suggests that, inasmuch as a trustee in bankruptcy had been appointed prior to the trial of this cause, the possession, as between the trustee and the receiver, belonged to the former. The receiver had, however, been appointed and qualified and this action was commenced before the adjudication in bankruptcy. Under such circumstances, the state court was not deprived of its jurisdiction, and the receiver continues to act notwithstanding the action of the bankruptcy court. *State ex rel. Heckman v. Superior Court King County*, 28 Wash. 35, 68 Pac. 170, 92 Am. St. 826. It is also claimed that the judgment awarding the trustee in bankruptcy his costs against Springer is erroneous. It is true, the trustee was brought in as a party defendant by Springer himself. The trustee did not, however, disclaim any interest in the property, but he filed an answer and claimed the right to possession as against both Springer and the receiver. He was denied the relief he asked, but was given a judgment for his costs against Springer. We think this was error, and that the judgment for costs should be reversed.

The judgment in the cause is reversed for all the reasons stated above, and the cause is remanded with instructions to enter a modified judgment after further hearing, in accordance with this opinion.

RUDKIN, MOUNT, and CROW, JJ., concur.

FULLERTON and ROOT, JJ., took no part.

[No. 7471. Decided October 23, 1908.]

THE STATE OF WASHINGTON, *on the Relation of the City of
Puyallup et al., Petitioners, Plaintiff*, v. THE SUPERIOR
COURT FOR PIERCE COUNTY, *Respondent*.¹

PROHIBITION—TO COURTS—WHEN LIES—INADEQUACY OF REMEDY BY APPEAL. The remedy by appeal is inadequate, and prohibition lies to prevent the superior court from proceeding to review the action of a city council on certiorari from the revocation of a liquor license, where it appears that the license would expire before the case could be heard on appeal (RUDKIN and FULLERTON, JJ., dissenting).

SAME—REMEDY BY CERTIORARI. Where the remedy by appeal is inadequate because the right would expire before an appeal could be heard, prohibition lies notwithstanding a remedy by certiorari, where the result would be the same whether determined on certiorari or prohibition (RUDKIN, J., dissenting).

INTOXICATING LIQUORS—LICENSE—REVOCATION—POWER OF CITY COUNCIL—REVIEW BY COURTS—PROHIBITION. Under Bal. Code, § 2934, conferring upon the city council the sole and exclusive authority and power to regulate, license, or prohibit the sale of spirituous liquors, the action of the city council in revoking a license without cause and refunding the unearned portion of the license fee is conclusive and not subject to review by the courts; nor is it restricted by Bal. Code, § 2935, authorizing the forfeiture and revocation of a license for violation of its terms, construing the two statutes together.

Petition for a writ of prohibition to the superior court for Pierce county, Clifford, J., filed in the supreme court July 6, 1908, to prevent a hearing in the superior court upon a writ of certiorari to review the revocation of a liquor license by a city council. Writ granted.

M. F. Porter, for petitioners.

Leo & Cass, for respondent.

DUNBAR, J.—On the 26th day of November, 1907, the city of Puyallup, acting through its mayor and city council, issued to William Meservey and George West, copartners, a

¹Reported in 97 Pac. 778.

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retail liquor license, for the term of one year. On the 10th day of June, 1908, the said city council by the affirmative vote of five of its councilmen, duly passed and adopted a resolution revoking all outstanding liquor licenses theretofore issued, and authorized the mayor and city clerk to refund to the holder of any license the value of the unexpired term thereof, and made said revocation to take effect on the 1st day of July, 1908. On the 30th day of June, 1908, said licensees appeared before the superior court of the state of Washington for Pierce county, and secured an order and writ of review from said court, requiring the city of Puyallup, petitioner here, to make complete returns to said court of the action of the petitioners, or any of them, in attempting or purporting to revoke the license aforesaid. The petitioners appeared before said court on the 3d day of July, 1908, and moved to quash said order and writ of review, and all subsequent proceedings had by said court, upon the ground that said court had no jurisdiction of the subject-matter upon which said application for writ of review was based. This motion was overruled, upon the ground that the city council was without authority to revoke an outstanding liquor license before the expiration thereof, except for cause. Hence, this petition for a writ of prohibition to prevent the superior court of Pierce county from proceeding in the cause.

Preliminary to the argument on the merits, there was some contention that the writ of prohibition should not issue. Since the decision in the case of *State ex rel. Townsend Gas & Electric Light Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933, we have uniformly held that litigants were not entitled to extraordinary legal remedies, whether the court was acting with or without jurisdiction, if there was a legal remedy by appeal. But the converse has been as uniformly held, viz., that such writs should issue if an appeal be not adequate. In this case it plainly appears that an appeal would not be an adequate remedy, for the reason that the license in question would expire before the case

could be heard on appeal. It was suggested that in such cases the petitioners should have applied for a writ of review, but the result would be exactly the same whether we determined the case on an application for a writ of review or prohibition. There is no occasion to have the record certified, for it is admitted that the only question sought to be brought before this court is the question of the construction of a statute, and the contention is over the form rather than the substance.

The principal case cited and relied upon on the merits of this case, viz., *State ex rel. Aberdeen v. Superior Court*, 44 Wash. 526, 87 Pac. 818, in which this identical question was involved, was determined by this court on a petition for a writ of prohibition. This case, we also think, determines the merits of this controversy. It is urged by the respondent, and was decided by the trial court, that the case was not in point, for the reason that the question in that case was the right of the court to review the action of the council in determining that facts existed showing a violation of the law by the saloon keeper, justifying a revocation of his license; but that in this case it is not the right of the city to inquire whether cause for revocation exists that is in issue; that the question is, did the city have power under the statute to revoke licenses without cause? It is conceded that the legislature might have conferred this arbitrary power upon the city council, but it is urged that it did not do so. Pierce's Code, §5714 (Bal. Code, § 2934), provides:

"The mayor and council, or other governing body of each incorporated city, incorporated town or incorporated village in the State of Washington, shall have the sole and exclusive authority and power to regulate, restrain, license or prohibit the sale or disposal of spirituous, fermented, malt or other intoxicating liquors within the corporate limits of their respective cities, towns or villages; provided, that the annual license fee for the sale of such spirituous, fermented, malt or other intoxicating liquors shall, in no instance, be less than three hundred (\$300) dollars, or more than one thousand (\$1,000) dollars, which said license fee shall be paid annually in ad-

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vance to the treasurer of the city, town or village, who shall pay ten (10) per cent thereof into the general fund of the state treasury, and hand the remaining ninety per cent into the general fund of the city, town or village treasury."

Section 5715 (Bal. Code, §2935), provides:

"In granting the license authorized by this act, the proper authorities shall exact from each applicant a bond in the sum of one thousand (1,000) dollars, conditioned that the applicant shall keep an orderly house and will not sell liquors to minors. He shall in case of violating the terms of the license forfeit the same, and be subject to the other penalties provided by law for illegal selling of spirituous, fermented, malt or other intoxicating liquors; the authorities granting the license shall have full authority and power to declare it forfeited for the violation of any of the terms upon which it is granted."

It is insisted that, construing these two provisions together, it was the legislative intention to give the city council jurisdiction only for cause, and that the latter portion of § 5715 would be meaningless and unnecessary if the council had authority to revoke under the provisions of § 5714. This may be true, but unfortunately legislative expression is not always exact; it is frequently redundant and more or less tautological; and while a strict construction might suggest this inconsistency, on the other hand the construction contended for by respondent would render indefinite and uncertain the plain provisions of § 5714, which confers the sole and exclusive powers to regulate, restrain, license or prohibit. It is not authority to regulate under certain circumstances, or to restrain under certain circumstances, but the authority is absolute and unlimited, and it is evident that the legislature intended to refer the whole subject to the city council. This was the view expressed by this court in *State ex rel. Aberdeen v. Superior Court*, *supra*, where it was said that "§ 2934 (P.C. § 5714) provides that the mayor and council of each incorporated city shall have the sole and exclusive right to regulate, restrain, license or prohibit the sale of intoxicating liquors

within the corporate limits of their respective cities, towns, or villages. This means that the city authorities are given a discretion in matters of this kind, which discretion is *final* and *conclusive*, and therefore cannot be reviewed by courts."

The other questions discussed by the respondent in this case were answered in the opinion in the case above cited. Believing that it was not the intention of the legislature to split the jurisdiction, or divide the authority on matters of this character, but, on the contrary, to refer the whole subject-matter to one tribunal, we are of the opinion that the superior court is without jurisdiction to act in the premises; and the writ is therefore granted as prayed for.

HADLEY, C. J., CROW, MOUNT, and ROOT, JJ., concur.

RUDKIN, J. (dissenting).—The writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." Bal. Code, § 5869.

"Where the inferior court has jurisdiction of the matter in controversy, prohibition will not lie. The writ does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate, and it matters not whether the court below has decided correctly or erroneously; its jurisdiction of the matter in controversy being conceded, prohibition will not lie to prevent an erroneous exercise of that jurisdiction. The exercise of power which it is sought to prohibit must be wholly unauthorized by law. Mere errors or irregularities in the proceedings which do not go to the jurisdiction will not be considered upon the application for a writ of prohibition. The sole question is as to the jurisdiction of the inferior court to take the proposed action, and the merits of the action will not be considered. Even consent of parties will not authorize the court to determine the merits. The writ cannot be used as a process for the review and correction of errors in inferior tribunals. Relief must be sought in one of the appropriate proceedings provided by law for the correction of errors. The improper decision of a jurisdictional question is not ground

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for the writ where the inferior court had jurisdiction to determine that question." 23 Am. & Eng. Ency. Law (2d ed.), p. 200 *et seq.*

Superior courts and their judges "shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties." Const., art 4, § 6.

"A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law." Bal. Code, § 5741 (P. C. § 1396).

Jurisdiction is the power to hear and determine.

"The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong." *Colton v. Beardsley*, 38 Barb. 29.

See, also, *Otis v. The Rio Grande*, 1 Woods 279; *Johnson v. Miller*, 50 Ill. App. 60; *Van Fleet's Collateral Attack*, p. 70 *et seq.*

"Jurisdiction of the subject-matter is power to adjudge concerning the general question involved. . . . It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power." Per Folger, J., in *Hunt v. Hunt*, 72 N. Y. 217.

"A justice of the peace . . . has no jurisdiction to try a man for felony, or to sentence to the penitentiary. That is a subject-matter which is entirely outside of his jurisdiction. If he assumes to try a man for manslaughter, and sentences him to the penitentiary, he is proceeding in a direction which is, entirely outside of the scope of his jurisdiction. On the

other hand, he may have jurisdiction of assaults and batteries, and does in most states. Suppose he proceeds to try a man charged with assault and battery, and suppose, in fact, the assault and battery was committed outside of the county over which his jurisdiction extends; then, although his judgment would be erroneous, and in excess of his jurisdiction, yet having jurisdiction of the subject-matter of assault and battery, and of the person of the defendant, it lies with him to determine whether such particular assault and battery comes within his jurisdiction; and his determination, though erroneous, ought not to subject him to an action for damages. He has jurisdiction of the subject-matter, and it is for him to determine whether the case is within his jurisdiction. He has the right to determine the question; and although he may determine wrongly, and although it may be a case which does not come within the limitation of his jurisdiction, and although he may have exceeded his authority, yet he had the power and the right to determine whether or no he had that jurisdiction, and it cannot be said to be a case wherein the entire subject-matter was outside of his jurisdiction." Per Brewer, J., in *Cooke v. Bangs*, 31 Fed. 640.

When an application for a writ of review is presented to one of the courts of this state, the court to which the application is made must determine at the threshold of the proceeding whether the inferior board or tribunal is exercising judicial functions, and whether it is exceeding its jurisdiction, or is acting illegally, or whether its proceedings are erroneous or void or not according to the course of the common law, and there is no appeal and no plain, speedy, and adequate remedy at law. In making such determination the court necessarily acts within its jurisdiction, and an erroneous decision of the questions thus presented for consideration will not oust the court of jurisdiction or render its judgment void. To hold that a court of general jurisdiction exceeds that jurisdiction every time it issues a writ or grants any other form of relief in an improper case or upon an improper showing, is to lose sight of all distinction between a want of jurisdiction and mere error in the exercise of jurisdiction. Such a holding

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practically limits the term "jurisdiction" to the power to hear and determine rightly and without error.

When the application for a writ of prohibition was presented to this court, it was incumbent on us to determine whether the court below was acting without or in excess of jurisdiction, and will it be claimed that the jurisdiction of this court would be ousted by an erroneous decision of that question? It seems to me that, under the constitution and laws of this state, the superior court of Pierce county has unquestioned jurisdiction to issue a writ of review, and to determine any and all questions upon which the rightful issuance of such writ depends, and that mere error in the exercise of that jurisdiction cannot be corrected in a proceeding of this kind.

FULLERTON, J. (dissenting)—I am of the opinion that the remedy of the relator was by an appeal from the order of the superior court, not by seeking a writ of prohibition. For that reason I dissent from the order the majority directs to be entered.

[No. 7393. Decided October 23, 1908.]

PORT BLAKELY MILL COMPANY *et al.*, *Respondents*, v.
HARTFORD FIRE INSURANCE COMPANY, *Appellant*.¹

INSURANCE—CONDITIONS—PERFORMANCE—BREACH—EVIDENCE—BURDEN OF PROOF. A promissory warranty in an insurance policy on the part of the assured to use due diligence in maintaining an automatic sprinkler system in good working order is a condition subsequent, the performance of which need not be pleaded and proved by plaintiff; and after the policy has attached, the burden of proving a breach is upon the defendant.

PLEADING—ACTIONS—CONDITIONS PRECEDENT—STATUTES. Bal. Code, § 4934, requiring the plaintiff to plead the performance of all conditions upon which the action is based has reference only to conditions precedent or necessary to the creation of the contract or to the perfecting of the right of action, and not to conditions subsequent.

¹Reported in 97 Pac. 781.

APPEAL — REVIEW — HARMLESS ERROR — DENIAL OF CONTINUANCE.

Where defendant submitted its case without evidence, solely upon a question of pleadings and the burden of proof, it is not in a position to allege prejudicial error in the previous denial of motion for a continuance asked for on the ground of the absence of a material witness.

Appeal from a judgment of the superior court for Kitsap county; Yakey, J., entered February 29, 1908, in favor of the plaintiffs, upon stipulation and a trial on the merits before the court without a jury, in an action on fire insurance policies. Affirmed.

Granger & Magill and Hughes, McMicken, Dovell & Ramsey (W. S. Goodfellow, of counsel), for appellant.

Titus & Creed, Walter S. Fulton, C. D. Sutton, and Hastings & Stedman, for respondents.

CROW, J.—This action was commenced by Port Blakely Mill Company, a corporation, and Detroit Trust Company, a corporation, to recover on certain insurance policies for a loss sustained by fire. From a judgment in favor of the plaintiffs, the defendant has appealed.

The appellant contends that the trial court erred in denying its challenge to the sufficiency of the evidence, in entering judgment for respondents, and in refusing to enter judgment in its favor. The respondents sued upon five policies of fire insurance, written by appellant upon a large milling plant owned by the Port Blakely Mill Company, upon which the Detroit Trust Company held a mortgage, and which plant was destroyed by fire. Proofs of loss were made, and the undisputed evidence shows that the appellant denied its liability on the sole ground hereinafter mentioned. It was stipulated that, if the respondents were held to be entitled to recover, their recovery would be for the sum of \$31,942, and interest, and judgment was so entered. Each policy had attached thereto a typewritten slip or rider, containing, with other stipulations, the following material provision:

"Warranted by the assured that due diligence be used that the Automatic Sprinkler System shall at all times be maintained in good working order."

The automatic sprinkler was a device installed in three sections, and so constructed that in case of fire the unusual heat would automatically open certain valves and cause the buildings to be flooded with water. The respondents pleaded the policies and riders, setting them forth as exhibits, which were made a part of the complaint. They alleged, that on April 22, 1907, the mill was destroyed by fire; that notice thereof was given to appellant on April 23, 1907; that within the proper time due and sufficient proofs of loss were furnished; that no objection was made thereto; that demand for payment had been made upon the appellant; and that it had denied any liability. The following allegation, directly involved in this appeal, was also made:

"That in all respects each of these plaintiffs has duly performed and complied with all the terms, provisions and conditions of said policy on its part to be performed or complied with, and that more than sixty days have elapsed since the terms, provisions and conditions of said policy were duly complied with by said plaintiffs."

The appellant by its answer specifically denied this allegation of performance, and affirmatively alleged:

"(1.) That at the time of the issuance and delivery of said policy of insurance, the premises thereby insured were equipped with an automatic sprinkler system for the purpose of protecting the property so insured from loss and damage by fire, and by reason thereof a reduction of fifty per cent. was made in the rate of said insurance and the premium paid to this defendant therefor.

"(2.) That in and by the terms of said policy of insurance, it was expressly covenanted, among other things, that the said assured warranted 'that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order.' And it was further in said policy of insurance expressly stipulated and agreed that the entire pol-

icy shall be void 'if the hazard be increased by any means within the control or knowledge of the insured.'

"(3.) That the said automatic sprinkler equipment for the mill plant of the said plaintiff, the Port Blakely Mill Company, consisted of three or more separate divisions installed for the purpose of affording fire protection to different portions of said mill plant, for the damage to which recovery is sought in this action; that water was supplied to said system through main pipes connecting with reservoir maintained by said mill company, and the water supply in each of said divisions was furnished and controlled through and by means of an automatic valve, controlled by air pressure; that the said sprinkler system, when properly maintained and in proper working order was supplied with water in such quantities and with such pressure upon the valves used in the said system, as that the heat produced by a fire in or about said mill would, through the melting of the sprinkler heads attached to the said system, release and open the said valves, and permit the water to flow through the same and out through the pipes distributed through the said mill and cause the said water to be sprinkled upon the fire; that beneath each of said automatic valves was a screw valve, by which the water from the main pipe could be wholly shut off from said valve.

"(4.) That on or about the 1st day of April, 1907, the said screw valve beneath the automatic valve, in what was known as the 'No. 3 automatic sprinkler division' in said mill plant, being the automatic sprinkler division which supplied fire protection to the eastern portion of said mill, was caused by the said plaintiffs to be screwed down and the pipes connected with said valve to be removed, altered and changed, and because and by means thereof the said water was wholly turned off from the said division, and the said plaintiffs carelessly and negligently, and without the exercise of due diligence by them, or either of them, caused and permitted the said valve to be so closed down and said pipes to be altered, removed, and changed, and carelessly and negligently caused and permitted the said 'No. 3 sprinkler division' to be and remain out of good working order and without any supply of water, and to be wholly useless and ineffectual as a means of fire protection from the said first day of April, 1907, continuously until after the fire and the damage caused thereby, on

the night of the 22nd day of April, 1907, as alleged in plaintiffs' complaint."

Respondents replied with denials and, in substance, alleged, that on April 1, 1907, it became necessary for the Port Blakely Mill Company to make certain repairs in, and extensions of, the mill and automatic sprinkler, which repairs and extensions were permitted under the terms of the policies; that for such purpose division No. 3 of the automatic sprinkler system was necessarily shut down until April 21, 1907, at which time the repairs were completed; that the water was then turned on; that the entire sprinkler system thereafter continued in working order; that it was not turned off during the fire as alleged by appellant; and that the mill company at all times used due diligence to maintain the sprinkling system in good working order. On the trial the respondents, having presented other evidence, rested without offering any evidence to show that the sprinkler system was in working order at the time of the fire, and it was upon the absence of any such proof that the appellant relied in making its challenge to the sufficiency of the evidence. In its opening brief the appellant says:

"This case involves a single, and as it seems to us, a simple question. The testimony in brief and the facts are undisputed. The question is as to which party, the plaintiff or the defendant, is entitled to judgment under the admitted facts. The material issue tendered by the various pleadings is whether or not the assured complied with the promissory warranty contained in the policies, which is as follows: 'Warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order.' Neither party offered any evidence on the trial relating to said warranty, or tending to show whether or not the plaintiff had complied with its provisions. On the merits, therefore, of the case, the question as to which party was entitled to judgment, turns upon the proposition of the place where the burden of proof rested."

Appellant contends that the burden rested upon the respondents; that their failure to assume and sustain the same

is fatal to their case, and that it is entitled to judgment. It insists that the stipulation relative to maintaining the sprinkler in good working order is a promissory warranty of respondents, as distinguished from other warranties or conditions of the policies, and that the burden of proof always rests upon the assured to show performance of such a promissory warranty upon their part, as a condition precedent to their right of recovery. Appellant cites Bal. Code, § 4984 (P. C. §404), and contends that, although it is contravention of the common law rule of pleading, which requires a plaintiff to allege and prove the performance of each and all of the conditions precedent in a contract upon which an action is based, it nevertheless retains the common law rule of evidence. Appellant therefore insists that, when the respondents, in compliance with said section, generally pleaded performance of all conditions precedent, and it by its answer specifically directed their attention to their failure to keep the automatic sprinkler in good working order, the pleadings were so framed as to place the burden of proof upon the respondents to show that the sprinkler was in good working order at the time of the fire.

In support of this contention appellant cites *Taylor v. Modern Woodmen of America*, 42 Wash. 304, 84 Pac. 867, and asserts that it has adopted the method of pleading therein prescribed as being necessary to impose the burden upon respondents. Although the appellant, citing considerable authority therefor, refers to the clause now under consideration as a promissory warranty made by the respondent mill company, we fail to see how such a distinction necessarily sustains its contention that compliance with its terms must in the first instance be alleged and proved by the respondents. In a limited sense, it might be contended that practically every stipulation in a policy of insurance, without regard to whether it is a promissory warranty or not, is a condition precedent to the assured's right of recovery, since the breach of most any of its provisions will prevent such recovery. It by no means follows, however, that compliance with all conditions of the

policy must be pleaded and proven by the assured in the first instance. While there is some conflict, the weight of authority seems to be that the assured is only required to plead and prove a compliance with those conditions which, in insurance law, are conditions precedent to the creation of the contract of insurance—such as the payment of premiums—or are conditions precedent to establishing the loss or claim—such as furnishing proofs—or taking other preliminary steps necessary to perfect the assured's right of action. Conditions to be performed by the assured after the policy has become a valid contract are conditions subsequent, being in the nature of conditions of defeasance, nonperformance of which may release the insurer from liability. When in an action on an insurance policy a plaintiff pleads performance under the provisions of Bal. Code, §4934, *supra*, his allegation has reference only to the performance of conditions precedent, such as those that are necessary to the creation of the contract, or to the perfecting of his right of action, and not to conditions subsequent. Upon a denial of this allegation, coupled with a statement in the answer of the particular condition precedent which had not been performed by the plaintiff, the burden, under the rule announced in *Taylor v. Modern Woodmen of America*, *supra*, would then be upon the plaintiff to prove a performance of, or compliance with, the particular condition precedent to the alleged nonperformance of which the answer has directed his attention, and that we think is as far as the rules of pleading and proof go towards imposing any burden upon the plaintiff. As to conditions subsequent, whether they be called promissory warranties or not, it is not in the first instance necessary for the assured to plead or prove their performance. Such conditions with their breach are to be pleaded and proven by an insurer seeking relief from the liability by reason of their nonperformance. *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 82 Pac. 113, 4 L. R. A. (N. S.) 636; *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56, 14 N.

E. 802; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. 699, 26 L. R. A. 313; *Allemania Fire Ins. Co. v. Fred*, 11 Tex. Civ. App. 311, 32 S. W. 243; *Redman v. Aetna Ins. Co.*, 49 Wis. 431, 4 N. W. 591; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Chambers v. Northwestern Mut. Life Ins. Co.*, 64 Minn. 495, 67 N. W. 367, 58 Am. St. 549.

If there be conditions in a policy of insurance which must be performed before its risk attaches, such conditions are recognized as precedent ones, and a plaintiff is bound to show his compliance therewith, the same being necessary to create the contract and give it life; but after the contract has come into legal existence, and has attached as a binding obligation, those warranties or conditions which afford a means whereby the obligation of the insurer may be extinguished are regarded as conditions subsequent or conditions of defeasance. The insurer may waive their breach and the insured may recover, or the insurer may claim their breach and secure a forfeiture of the policy. The fundamental reason for placing the burden of proof on an insurer to show nonperformance of promissory warranties, however they may be expressed, is that such nonperformance affords the insurer a ground for forfeiting the rights of the insured after the policy has attached and become a valid contract. The prevailing modern rule, as shown by the weight of authority, seems to be that, after the policy has once attached, the burden is on the insurer to allege and prove in the first instance any ground of forfeiture upon which he relies. The trial court rightfully denied appellant's challenge to the sufficiency of the evidence.

The appellant also contends that the trial court erred in overruling its motion for a continuance. The action was commenced on October 3, 1907, and on February 1, 1908, was set for trial on February 17. The appellant, on February 6, by a written motion supported by affidavits, applied for a continuance to enable it to take the deposition of one Lars

Olson, an absent witness. The motion was heard on appellant's affidavits and respondents' controverting affidavits. It appeared that the evidence of Olson was of such a character as to be material, if appellant had seen fit to introduce any proofs. The trial court refused the continuance on the ground that the appellant had not shown due diligence in attempting to secure the presence or evidence of the witness. The affidavits are lengthy and conflicting; but after giving them careful consideration, we are unable to conclude that the trial court abused its discretion or committed prejudicial error in denying the application. In any event, the record shows that the appellant submitted its case solely on a question of pleading and the burden of proof. Having rested upon the respondents' evidence, and having interposed its challenge thereto, it was in no position to offer the evidence of Olson had he been present. It is now in this court demanding judgment upon the pleadings and respondents' evidence. With the record in this condition, we fail to understand how it has been prejudiced by the action of the trial court in denying the continuance, even though it had made a sufficient showing of diligence.

The judgment is affirmed.

HADLEY, C. J., DUNBAR, and MOUNT, JJ., concur.

FULLERTON, J., concurs in the result.

RUDKIN and ROOT, JJ., took no part.

[No. 7284. Decided October 27, 1908.]

ANNIE SECOMBE, *Respondent*, v. CARRIE J. FULLER,
Appellant.¹

VENDOR AND PURCHASER — CONTRACT TO CONVEY — PERFORMANCE—
WAIVER OF TIME LIMIT—SPECIFIC PERFORMANCE. There is a waiver
of the thirty-day time limit for perfecting title to land agreed to be
sold, rendering the contract binding on the vendor and subject to
specific performance, where it appears that a corrective deed was
required from an eastern party, which the vendor wrote for, and
upon answer being received that the party was dead but that steps
would be taken to secure a correction through court proceedings, the
vendor acquiesced in the statement of her agent that the only thing
to do was "to wait until the deed comes," which could not be within
the thirty days; that correspondence was had with reference to se-
curing the deed, and no return of earnest money paid to the vendor
was tendered to the vendee for sixty days, who refused to receive it,
or accept a part only of the land; and the vendee tendered the full
price as soon as she learned of the arrival of the corrective deed.

Appeal from a judgment of the superior court for Pierce
county, Clifford, J., entered December 18, 1907, upon find-
ings in favor of the plaintiff, after a trial before the court, in
an action for specific performance of a contract to convey
land. Affirmed.

C. M. Easterday, for appellant.

Ellis, Fletcher & Evans and *Harry H. Johnston*, for re-
spondent.

ROOT, J.—This is an appeal from a judgment and decree
of specific performance entered against appellant in the trial
court. On the 18th day of June, 1906, appellant, by her
agent, G. D. Grant, entered into a written agreement for the
sale to respondent, for \$1,000, of the premises in controversy,
being a tract of land 12.8 rods by 25 rods, the agreement
being in form of a receipt for \$100 earnest money, and de-

¹Reported in 97 Pac. 805.

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scribing the property and containing the terms and conditions of the sale and containing the following provision:

"If said abstract does not show such title, or cannot be made to do so within 90 days from notice of defects, then this agreement to be void, and all payments hereunder shall be refunded. Otherwise, if the purchaser refuses to complete the purchase in accordance with the terms hereof, all payments made shall be forfeited as commissions and compensation for examining property, abstracts and papers; but such forfeiture shall not impair the right of either party to pursue the usual remedies for breach of this contract."

An abstract was furnished by appellant to respondent within a few days, which revealed that, by inadvertence or mistake, appellant's grantor in the description of the property in her deed to appellant had omitted a strip of land nine feet in width from the east side of the tract in question. This grantor was one Mary R. Wolfe, who was supposed to be living in some eastern state. Appellant caused a letter to be immediately sent to the former address of said Mary R. Wolfe, and received an answer thereto in due course, from her brother, stating that Miss Wolfe was dead, but that steps would be immediately taken by her heirs or legal representatives whereby a proper conveyance should be made of the nine feet of ground omitted as aforesaid. This letter was immediately shown by the agent of appellant, Mr. Grant, to Mr. Johnston, an attorney for respondent, and the latter remarked that there was nothing to do but to wait for the deed. It was evident to both parties that this corrective deed could be obtained, but not within the thirty days mentioned in the receipt. After the expiration of said thirty days, the appellant offered to make a deed to respondent of that portion of the property to which she had title, and to allow a proportionate reduction in the purchase price, but this offer was declined by respondent. Appellant thereafter offered to refund the \$100 and terminate the transaction. This offer was also declined by respondent. There is some evidence to

the effect that the \$100 earnest money was used by appellant or her agent, and that they were not in a position to refund the same until some time after the thirty days had expired.

In the latter part of July, appellant's agent Grant re-advertised the property for sale. This advertisement coming to the attention of respondent, she caused her receipt to be placed of record. The first offer to refund the \$100 appears to have been made on August 21, at which time there was coupled with the offer to return a demand for a quitclaim deed from respondent to remove the cloud occasioned by the filing of her receipt. The corrective deed was received by appellant about February 6, 1907, and a plat subdividing the entire property into lots and blocks was filed by her about four days thereafter. As soon as respondent learned of the arrival of this deed, she tendered to appellant the \$900 balance of the purchase price, and demanded the deed of the entire premises. The deed being refused, she instituted this action on or about April 10, 1907, and paid the \$900 into court. Two lots were sold by appellant after platting, for the sum of \$300. The trial court entered a decree requiring appellant to convey to respondent all of the property except the two lots that had been sold and conveyed. Respondent was credited with \$300, the proceeds of the sale of the two lots, and appellant was allowed the sum of \$261.16, being expenses incurred in clearing and platting the property and for taxes on the property for the year 1906.

It is the contention of appellant that, when it became evident that appellant's title could not be made good within thirty days from notice of defect, the agreement became absolutely terminated and was no longer in effect as to either party. Respondent contends that the provision as to the agreement becoming void was one for her benefit alone, and that she was privileged to waive the same if she elected so to do. There is a conflict in the authorities upon this question. Some hold that, under an agreement of this kind, there is an absolute termination of all obligations as to each party when

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it is definitely ascertained that the title cannot be perfected within the time mentioned. Others hold that a provision of this kind is for the benefit of the vendee; that he may elect to receive back his earnest money and thereby terminate the contract, or he may elect to waive that right and wait until the vendor can perfect his title, even though it is impossible to make such perfection within the period prescribed in the agreement, if it can be done within a reasonable time.

We are not required, however, to pass upon this question, as we believe the evidence shows a waiver by both parties of the time limit. The appellant testified that Mr. Grant was her agent in this transaction, and that she told him to "do anything that is fair and just." There was evidence that she told respondent's agent that whatever Mr. Grant did in the matter would be satisfactory to her (appellant). The agent, who was attending to the matter for respondent at that time, testifies that Mr. Grant brought the letter announcing the death of Miss Wolfe to him, and that when he stated that "the only thing we could do was to wait until the deed comes," Mr. Grant said that was all right, and that such course seemed agreeable to him. Appellant testified that she knew that correspondence was being carried on relative to securing the corrective deed. The earnest money was not returned nor tendered back within the thirty days. It was not tendered until the expiration of about sixty days, and then only upon condition of respondent executing and delivering a quitclaim deed of the premises to appellant. There was also testimony to the effect that in September Mr. Grant suggested to respondent's attorney that the latter write to the brothers of Miss Wolfe, and to do what he could to urge the forwarding of the corrective deed. While there is some conflict in the evidence, and it is not as conclusive as might be desired, yet we think it is made reasonably clear that, that, at the time of the expiration of the thirty days' limit, both of these parties contemplated the continuation of the contract in force

and the securing of the corrective deed. They had been assured by the legal representatives of Miss Wolfe that such deed would be forthcoming in the course of the administration of the estate, and it was doubtless the intention of both parties at that time to await the arrival of the deed and then conclude the deal. In the light of all the evidence bearing upon the conduct of these parties and their agents, we are led to believe that the judgment and decree of the trial court was correct, and it is hereby affirmed.

HADLEY, C. J., MOUNT, and DUNBAR, JJ., concur.

[No. 7673. Decided October 27, 1908.]

SUSAN J. PERRY, *Respondent*, v. THE CITY OF CENTRALIA,
Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—UNGUARDED MANHOLE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. The questions of the negligence of a city in guarding a manhole in a sewer in course of construction, and of the contributory negligence of the plaintiff in falling into the same, are for the jury, where it appears that the testimony conflicts as to the barriers on one side of the hole, there being testimony to the effect that sections of sewer pipe placed as barriers stood so far apart and far back that one could easily pass between them without knowing thereof, that a red signal light was fifteen feet distant from that edge of the hole, and where it appears that the plaintiff, on a very dark night, in an endeavor to avoid a muddy crossing caused by the construction work, of which she had general notice, walked into the hole, being misled by the signal light, which she supposed marked the location of the hole.

SAME—EVIDENCE—SHOWING ULTIMATE LIABILITY OF CONTRACTOR—TRIAL—WITNESSES—CROSS-EXAMINATION. In an action against a city for personal injuries sustained by reason of street work carried on by a contractor, it is not error, on cross-examination of a son of the contractor for the purpose of showing his interest and discrediting his testimony, to show the fact that the contractor might be ultimately liable to the city for the amount of any recovery against the city.

¹Reported in 97 Pac. 802.

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TRIAL—VERDICT—SPECIAL VERDICT. An answer to a special interrogatory, to the effect that plaintiff had not "walked around" a manhole three or four times and did not know of its location, is proper where it simply appeared that she had passed by and knew of its general location, and the same is not inconsistent with a general verdict for plaintiff.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered May 25, 1908, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained in falling into a sewer manhole in a public street. Affirmed.

B. H. Rhoades and Boyle, Warburton, Quick & Brockway, for appellant.

Forney & Ponder and Aust & Terhune, for respondent.

HADLEY, C. J.—This is an action to recover damages against the city of Centralia, for personal injuries received by the plaintiff from falling into a manhole, in one of the streets of said city. A sewer had been recently constructed on King Street, which extends from north to south and crosses Walnut street, which extends east and west. The manhole was located in the intersection of the two streets, and to the north of the manhole, along King street, the sewer had been backfilled. The manhole was a short distance to the southeast of the intersection of the central lines of the streets. A pile of earth and gravel, which had been thrown up from the manhole, was placed on the north, west, and southwest of the hole, surrounding it in the form of a semicircle. It was not far from the edge of the hole and was of sufficient height to form a barrier against ordinary stumbling into the hole by pedestrians or teams.

The evidence conflicts as to the situation on the easterly side. The defense claims that three large sections of sewer pipe stood on end in the form of a semicircle, forming a barrier, but other testimony was to the effect that these stood so

far back and so far from each other that they formed no barrier in the darkness, as one could easily pass between them, not knowing they were there. A red light was placed upon a stick which stood in, and was supported by, a section of sewer pipe. But this was located, according to some of the testimony, nine feet northwest of the edge of the manhole, and the stick leaned away from the manhole, making the light, as shown by some of the testimony, at least fifteen feet from the easterly edge of the manhole.

The plaintiff came from a house at the northeast corner of King and Walnut streets, where she had been calling. It was in the evening and was very dark. She lived upon the south side of Walnut street, near the middle of the block, adjoining King street on the west. She had observed this construction work going on, and had seen the manhole at that place by daylight. Her observation had been merely casual as she passed, and in a general way she knew the location. As she went from her home to call at the house of her neighbor, she passed to the west and north of the manhole, and crossed over the newly filled sewer. Recent rains had made the newly filled places muddy and slippery and disagreeable for crossing, particularly in the darkness. The principal travel there was to the north and west of the hole; but that part of the street intersection to the easterly was open and free for travel. When the plaintiff came out of her neighbor's house to return home, she testified that, by reason of the disagreeable crossing to the north and west, as aforesaid, she decided to pass to the east and south of the manhole, and that she supposed the signal light indicated the place of the hole itself; that owing to its distance away from the hole, she was misled, and also owing to the further fact that she encountered no barrier or obstruction of any kind, she walked into the manhole and sustained serious injuries. The defense was that she was guilty of contributory negligence. She recovered a verdict and judgment for \$5,000, and the city has appealed.

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It is assigned that the court erred in overruling appellant's motions for judgment on the pleadings, for a nonsuit, and for a directed verdict. These motions practically involve the same subject-matter and do not require separate discussion. We think the statement we have made above is a fair statement of the essence of the testimony submitted by respondent. The pleadings substantially bear out the same facts. Under the testimony, it was not for the court to say, as a matter of law, that respondent's injuries were due to her contributory negligence. It was peculiarly for the jury to say whether she was negligent in passing to the east of the manhole, under all of the circumstances, and whether she was misled by the location of the signal light, and by the absence of sufficient barriers on that side of the manhole. Respondent contended that the city was negligent in placing the red light where it was, and in not placing a proper barricade around the east side of the manhole. These questions of negligence and contributory negligence were both properly submitted to the jury.

Appellant relies much upon the case of *Hobert v. Seattle*, 32 Wash. 330, 73 Pac. 383, as an authority in its favor here. To our minds the facts are very dissimilar. Mrs. Hobert knew the ditch was in the street, that it was dangerous to cross it without a light, and that there was no way to proceed upon that street at that place except by crossing the dangerous ditch. She therefore knowingly and negligently took all the chances and clearly contributed thereby to her injury. In the case at bar, however, the respondent, while knowing that the dangerous place was in the street, knew also that there were ways of crossing the street intersection without encountering the danger. It was for the jury to say whether she exercised the ordinary care of a prudent person in attempting to pursue in the darkness one of those ways, and whether but for the negligence of appellant she could have escaped injury.

The next contention is that the court erred in permitting the cross-examination of one of appellant's witnesses, by which it incidentally appeared that the Northwestern Bridge Company may possibly become liable for any judgment that may be recovered here. The Northwestern Bridge Company had the contract with the city for the construction of the sewer, and the witness was a subcontractor for a portion of the work. The father of the witness was vice president of the Northwestern Bridge Company, and the avowed purpose of the cross-examination was to discredit the testimony of the witness because of his interest in behalf of his father whose company might become liable. The attempt to show the interest of the witness which might influence his testimony was legitimate cross-examination. But it is contended that, in so doing, the fact was disclosed that some one else might become liable to pay to the city the amount of any judgment that may be recovered in this action. It is argued that the situation before the jury was in effect the same as in cases where this court held it to be reversible error for a plaintiff to place before a jury the fact that a defendant held a policy of insurance issued by a guaranty company to protect against the very liability then involved. In the case of a guaranty policy, it is a generally known fact, to jurors and all others, that the insurance is for that express purpose, and the manifest purpose of getting the fact before the jury is to try and influence the amount of the verdict by lodging the implication in their minds that a local party defendant will not be required to pay the amount whatever it may be. In the case at bar, however, there was no insurance contract mentioned, and there was the mere suggestion that a remote liability might arise by reason of some construction contract. We think it would be extending too far the doctrine of inhibition against disclosing the existence of liability insurance to say that a cross-examination such as the one in the case at bar constitutes reversible error. The right to show the interest which may have influenced the witnesses existed, and

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it could not well be shown in any other manner. The witness answered that he had the interest which a son would feel for a father under the circumstances, and we think it cannot be said that there was reversible error in this regard.

It is next insisted that the court erred in overruling appellant's motion for judgment on the special findings of the jury notwithstanding the general verdict. It is argued that the special interrogatories and the answers thereto are so similar to those in *Hobert v. Seattle, supra*, as to be controlling here. We have already pointed out the distinction between that case and this one, and we find no necessary inconsistency between the special and general verdicts. It is claimed that the answer to the following interrogatory was not supported by the evidence: "Question: Had plaintiff walked around this manhole three or four times previous to the injury in the daytime, and did she know, or by the exercise of ordinary care and observation should she have known, the location and surroundings of said manhole? Answer: No." It cannot be said that the evidence showed that respondent had "walked around" the manhole three or four times, and having reference to the circumstances and surroundings, it cannot be said that the remainder of the interrogatory was improperly answered. The answer is consistent with the general verdict, and we find the motion of appellant for judgment upon the special verdict was properly denied.

We do not find the objections to the instructions well taken. We think the jury were fully and fairly instructed upon the law of the case, and we find no error in that particular. The motion for new trial was properly denied, and the judgment is affirmed.

RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 7686. Decided October 27, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. A. RIXIE *et al.*,
Appellants.¹

HIGHWAYS—OBSTRUCTION—EVIDENCE—ADMISSIBILITY. In a prosecution for obstructing a public road, a part only of which was closed by gates, testimony as to the gates was immaterial upon an issue as to other portions of the road across which defendants felled a tree for the purpose of preventing travel thereon.

SAME—EVIDENCE—SUFFICIENCY—HIGHWAY BY PRESCRIPTION. The testimony of a pioneer that a road was opened in 1852 and had been continuously traveled by the public as a public highway ever since that time without any interruption, is ample to make a case for the jury on the question of a highway by prescription, by adverse use and claim of right, and it is immaterial that the highway led up to a gate and continued no farther.

SAME—PRESCRIPTIVE USE ACROSS PUBLIC LANDS. A highway may be established across public lands by adverse use.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered February 5, 1908, upon a trial and conviction of obstructing a public highway. Affirmed.

Vance & Mitchell, for appellants.

P. M. Troy, for respondent.

HADLEY, C. J.—This is a prosecution for the obstruction of a county road. The defendants were jointly tried before a justice of the peace and a jury, in Thurston county. They were convicted and a fine of \$50 was assessed against each defendant. They thereupon appealed to the superior court of Thurston county, where they were again tried before a jury. They were again convicted, and the court adjudged that each defendant shall pay a fine of one dollar, and that they shall also be required to pay the costs of the suit, amounting to \$239.60. Both defendants have appealed to this court.

¹Reported in 97 Pac. 804.

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Appellants assign as error that the court denied their motion for nonsuit and for a directed verdict at the close of the state's testimony. They contend that the state failed to show that the way obstructed is a public highway. If it is a public road, it has become such by prescription through adverse user. There was much said in the testimony about certain gates which it is claimed cross this way. It is argued that the maintenance of the gates shows a permissive use only. Whatever may be true about the way included between the points designated on the plat in the record as "gate No. 1," to the north, and "gate No. 2," to the south thereof, it must be said that that particular place is not in controversy here. The county does not claim that the way between the gates, or any way at that place to the north of gate No. 2, is a public highway, and the state did not undertake to make such claim in behalf of this prosecution. The claim of the county is that all of the traveled way there to the south of gate No. 2, and which is designated on the plat as "old road," is a public highway, and that it was that road which the appellants obstructed.

The state introduced testimony to show that appellants cut a tree and caused it to fall across this way some distance to the south of gate No. 2, and that they did it for the purpose of obstructing the road and preventing traveling thereon. The testimony concerning the gates was, therefore, immaterial so far as the obstruction caused by the fallen tree was concerned, and it was for the jury to determine without reference to the gates whether the place of the obstruction was in a public highway.

The testimony of Andrew Chambers, a venerable pioneer of that region, was to the effect that the road from gate No. 2 to the southeasterly, including the place of the obstruction, was opened in 1852, and that it has been continuously traveled by the public as a public highway since that time. We think the evidence that there has never been any interruption of the travel there since 1852 was ample for the jury, on

which they might determine whether the travel was adverse under a claim of right and whether the way had become a public highway by prescription. If the use was continuous and adverse, then, under any statute of limitation upon the subject that has ever existed in the territory or state, the highway was long since established. It is immaterial that the traveled way may lead up to gate No. 2 and no further, not connecting on the north with another highway.

"It is settled that a *cul de sac* may be a highway, or in other words that it is not essential that the highway be open at both ends so as to form a thoroughfare, but it may be closed at one end by private lands or buildings." 15 Am. & Eng. Ency. Law (2d ed.), 351, and cases there cited.

The cause was therefore properly submitted to the jury, and it was not error to deny the motion for nonsuit or for a directed verdict.

Complaint is made of the instructions, but we find no error therein. We think the instructions were clear, direct, and to the point, and that they fully covered the legal propositions involved in the case. During the early days of the travel over this road, it ran across government land, and the court instructed that it was immaterial for the purposes of establishing a highway by prescription whether it ran across government land or over private premises. This was correct within the decision of this court in *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858. We do not find any error on the part of the court, and the verdict of the jury settled the facts in the case against the appellants. The judgment is therefore affirmed.

RUDKIN, MOUNT, CROW, DUNBAR, and ROOT, JJ., concur.

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[No. 7514. Decided October 30, 1908.]

SEVERIN JOHNSON, *by his Guardian Ad Litem, Carl Runquist,*
Appellant, v. A. F. COATES LOGGING COMPANY,
Respondent.¹

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—OPERATION OF MACHINERY—EVIDENCE—SUFFICIENCY. One employed as a second loader in a logging camp, whose hand was injured while pulling slack and unwinding line from the spool of a donkey engine, is guilty of contributory negligence precluding any recovery, where it appears, that it was obvious to one of his experience that there was danger in getting his hand caught in pulling slack through the block if the line was held after it was reversed, and he frankly admitted that he was paying no attention, and there was ten feet of loose line at the time, giving him opportunity to let go, or detach his glove caught on the line, in case he had been paying attention.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 20, 1908, in favor of the defendant, upon granting a nonsuit, after a trial before the court and a jury, in an action for personal injuries. Affirmed.

Govnor Teats, for appellant.

W. H. Abel and *A. M. Abel*, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries. The plaintiff was employed by the defendant as second loader in the defendant's logging camp. He was more than twenty years old at the time of the accident. He was born in Norway and came to America in 1902. His answers to questions at the trial indicate a fair knowledge of ordinary English. After he came to America he worked in a tannery at Racine, Wisconsin, for about eleven months. He afterwards worked in the iron mines where steam shovels were used for hoisting purposes. He worked as a sailor on the

¹Reported in 97 Pac. 801.

Great Lakes for two summers, and also worked for thirteen months as a carpenter. He saw the hoisting machinery operated on the vessels where he worked on the Great Lakes. He had received a man's wages for his work for three years before the time of the accident. With this previous experience, he applied to the defendant for work, and stated that he had been working in the woods. He worked about the camp for six days when he was asked by the foreman to work as second loader. Some time before that he had a talk with a Scandinavian friend about the work of the second loader. One of his duties was to pull the line through a block, thereby unwinding the line from the spool of the donkey engine so as to furnish the head loader with sufficient slack line to coil or hitch around the logs which were to be rolled onto the car. While working there his hand was caught in the block, and three fingers crushed or cut off. At the trial the court granted the defendant's motion for nonsuit, and the plaintiff has appealed.

Appellant contends that the work was new to him, and that respondent failed to sufficiently instruct him. He says he was simply told to go and pull the slack. The situation was simple and in no manner complicated. It must have been obvious to one of his experience that, in pulling slack through the block, there was no danger in getting the hand caught in the block; but that if one should hold to the line after it was reversed, his hand would be brought into the block. He claims that the line, which was a steel wire rope, had jagged or sharp ends projecting from it on account of its worn condition, and that one of these pierced his glove and drew his hand into the block. There was conflict in the testimony submitted by appellant as to whether there were jaggars on the line or not, but in any event, adopting the view that they were there, the appellant frankly admits that he was paying no attention at the time, and he was apparently not thinking of the situation or of its surroundings. There was about ten feet of loose line at the time, and it seems conclusive that, if appel-

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lant had not been indifferent to his surroundings, he might easily have removed his hand by either withdrawing the hand from the glove or by the detachment of the glove from the line. We think that his confessed inattention to the situation must be taken as contributory negligence, and that under such circumstances he cannot recover. The trial court personally observed the witness and heard his testimony in all particulars, and it having reached the above conclusion after a careful consideration of the testimony, we believe that the record discloses no sufficient reason why we should hold otherwise.

The judgment is therefore affirmed.

RUDKIN, MOUNT, CROW, and ROOT, JJ., concur.

[No. 7489. Decided October 30, 1908.]

WEST COAST SHINGLE COMPANY, *Appellant*, v. MARKHAM
SHINGLE COMPANY, *Respondent*.¹

SALES — CONTRACTS — RESCISSION. A contract for the sale of shingles to be shipped in car load lots without delay, is mutually rescinded where it appears that the vendor manufacturer wrote asking the vendee not to rely upon it for the shingles because its dry kiln had burned and it could not get cars and it would be impossible to ship for some time, to which the vendee replied expressing sympathy for the loss by fire, and asking that notice be given when in shape to again make shipments.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 23, 1908, in favor of the defendant, after a trial before the court without a jury, dismissing an action on contract. Affirmed.

J. B. Bridges (*Hudson & Holt*, of counsel), for appellant.
W. H. Abel, for respondent.

HADLEY, C. J.—This is an action to recover damages for an alleged breach of contract to ship shingles. The contract

¹Reported in 97 Pac. 801.

as alleged was that the plaintiff gave to the defendant its orders for four carloads of extra *A 16" 6-2 red cedar shingles, at \$1.80 per thousand, and for four carloads of the same kind of shingles at \$2 per thousand, the shingles to be shipped according to the orders without delay; that the defendant accepted the orders and agreed to make shipments within a few days after acceptance. Breach of the contract is alleged, and the damages are laid at \$1,660.70. The answer denies that the plaintiff has been damaged, and alleges that by mutual consent prior to the bringing of the suit, the contract sued upon was rescinded. The cause was tried by the court without a jury, and resulted in a judgment for the defendant dismissing the action. The plaintiff has appealed.

It is assigned that the court erred in making the following finding of fact:

"That on March 15, 1907, by letter, defendant notified plaintiff not to depend upon it for said shingles, and thereby rescinded the said contract, and by letter of March 21, 1907, the defendant acquiesced in said rescission and thereby the said contract was terminated."

The evidence principally consists of a series of letters constituting an extended chain of correspondence. The correspondence is too extensive to set forth or to discuss here in detail. It is sufficient to say that it sustains the finding of the court on the subject of mutual rescission of the contract. On March 15, 1907, the respondent wrote the appellant as follows:

"Gentlemen:—Please do not depend on us for any shingles. So far we were unable to obtain cars, and now our kilns are burned to the extent that it will take many weeks before we can dry any shingles. The fire occurred on the 8th inst., and we are just now concluding the adjustment of our loss with the insurance people."

To that letter appellant answered as follows:

"Gentlemen:—We have your favor of the 15th and are sorry to learn that you have had another fire. You are certainly playing in hard luck, particularly at this time when

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the embargo will shortly be lifted and you would have been able to get a good price for some shingles. However, we believe that the price will remain \$2 and better for several months, if not for the balance of the year, and if you can get your kilns rebuilt quickly and take advantage of the good market, you can probably soon make up your loss; but of course it is a loss just the same. As soon as you are in shape to again make shipments, trust you will let us hear from you."

We think these two letters taken together constituted a mutual rescission. In view of the positive request in respondent's letter that appellant should not depend upon the former for any shingles, we think the reply to the letter showed an acquiescence in the request, and appellant's letter contained the further simple request that business relations might be resumed at some time in the future. The determination of this question of fact disposes of the case in respondent's favor, and the judgment is therefore affirmed.

RUDKIN, MOUNT, DUNBAR, CROW, and ROOT, JJ., concur.
FULLERTON, J., took no part.

[No. 7728. Decided November 2, 1908.]

THE CITY OF TACOMA, *Respondent*, v. WILLIAM BIRMINGHAM
COMPANY, *Appellant*.¹

EMINENT DOMAIN—PROCEEDINGS—APPEAL—TIME FOR TAKING. AN appeal from an order setting aside a verdict and judgment and dismissing condemnation proceedings, on motion of the plaintiff, is governed by Laws 1907, p. 338, providing that all appeals in condemnation proceedings shall be taken within thirty days from the date of the rendition of the judgment appealed from; and the general act allowing appeals from orders vacating a judgment within ninety days has no application.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered August 12, 1908, setting aside a

¹Reported in 97 Pac. 971.

verdict and judgment and dismissing a condemnation proceeding, on motion of the plaintiff. Appeal dismissed.

James M. Ashton and *W. H. Hayden*, for appellant.

T. L. Stiles, *F. R. Baker*, and *Frank A. Latcham*, for respondent.

DUNBAR, J.—This is a motion to dismiss an appeal from an order dismissing a proceeding to condemn certain personal property situated in a street in the city of Tacoma. The city commenced the proceeding, a jury assessed the damage, and a judgment was entered thereon. The city then moved the court to set aside the judgment and verdict and dismiss the proceeding, on the ground that there was no jurisdiction of the subject-matter, and the motion was granted and an order entered accordingly, on the 12th day of August, 1908.

The notice of appeal from that order was served October 7, 1908, fifty-six days after its entry. This motion to dismiss is made on the ground that the time for appealing had passed, under section 51 of the act of 1907, p. 338, under which this proceeding was taken, and which provides that all appeals must be taken within thirty days from the date of rendition of the judgment appealed from. Counsel for appellant concedes the provision of the statute limiting the appeal to thirty days, but insists that the appeal is in substance from a final order vacating a judgment; that the order of the court was in effect the vacation of a judgment; that the appellant was compelled to mention the dismissal in the notice of appeal on account of respondent including its order of dismissal in the order vacating the judgment; that therefore the appeal, being from an order vacating a judgment, falls within the general statute in that respect, and that an appeal taken any time within ninety days meets the requirements of the law. This contention we think cannot be sustained, under the provisions of the statute, which seem to be sweeping; the statute providing that, except as herein otherwise provided, the practice

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and procedure under this act in the superior court and in relation to the taking of appeals and prosecution thereunder, shall be the same as in other civil actions, but all appeals must be taken within thirty days from the date of the rendition of the judgment appealed from. The action was brought under the provisions of the act of 1907, and the law providing that all appeals from judgments which are obtained under the provisions of this act must be taken within thirty days from the rendition of the judgment seems to leave little room for discussion.

But in addition to the seemingly plain provisions of this statute, this court has decided in *Brown v. Davis*, 36 Wash. 135, 78 Pac. 779, that § 4, p. 74, Laws of 1903, requiring appeals from the judgment in an action to foreclose a tax lien to be taken within thirty days, applies to an appeal from an order denying a motion to vacate a judgment, and held that an order vacating the judgment was an order within the provisions of the statute providing for the limitation of the time for appeal. To the same effect are, *Pedigo v. Fuller*, 37 Wash. 529, 79 Pac. 1129, and *Harris v. Levy*, 39 Wash. 158, 81 Pac. 550.

The motion to dismiss the appeal must be sustained.

MOUNT, ROOT, FULLERTON, and RUDKIN, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[No. 7538. Decided November 2, 1908.]

SOUTH TACOMA FUEL & TRANSFER COMPANY, *Respondent*,
v. TACOMA RAILWAY & POWER COMPANY, *Appellant*.¹

STREET RAILWAYS—COLLISION WITH TEAM—PLEADING AND PROOF—VARIANCE—MATERIALITY. In an action for damages to plaintiff's team, there is no material variance between a complaint alleging that the team was "struck, knocked down and run over by defendant's cars," and proof that five or ten minutes after the team was knocked down by one street car, and while one horse was still down, it was struck by another car; as the second collision happened so soon after the other as to be part of the same transaction, and as the remedy of the defendant was by motion against the comprehensive language of the complaint, a variance being immaterial unless a party is misled to his prejudice.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 11, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages from a collision. Affirmed.

Blattner & Chester and *L. A. da Ponte*, for appellant.

Ira A. Town and *Bates, Peer & Peterson*, for respondent.

DUNBAR, J.—This is a suit to recover damages for injuries to respondent's two horses, sustained in a collision with appellant's cars, in the city of Tacoma, January 2, 1908. Respondent's team was engaged in grading Delin street, and in the performance of work it was necessary to pass back and forth over appellant's tracks. Respondent's teamster drove upon appellant's south track with a team hitched to a drag scraper loaded with earth, and just as he did so a car on appellant's north track pulled up in front of the team and stopped, and while in this position a car came down on the south track and hit the team. The horses were knocked down by the impact, and after the car pulled out the teamster succeeded in

¹Reported in 97 Pac. 970.

getting one of the horses up and rolled the other horse to one side of the track. In a few minutes—the testimony making the time from five to ten—and while the horse was still lying on the track, another of appellant's cars came along on the same track, going in the same direction, and struck the horse again, tearing his harness off and knocking off a portion of the car step.

The testimony in relation to the striking of the horse by the second car was objected to by the attorney for the appellant, which objection was overruled and the testimony admitted. Upon the admission of this testimony, the appellant bases its principal contention of the commission of error by the court, on the ground that there was a variance between the complaint and the proof to such an extent that the appellant was not notified by the pleadings or by the complaint that damages were claimed by reason of the striking of the horses by any other than the first car.

The court held that, while the second collision was not alleged, it happened so soon after the first collision as to be a part of the same transaction. We think it was a part of the same transaction, and further think that it cannot be said that the second collision was not alleged, for the language of the complaint is not exactly as is quoted by the appellant, "confined to one car," but the language is, "was struck and knocked down and run over by defendant's cars;" so that we think that the defendant was notified. Damage was claimed, not as the result of collision with any particular car, but as the result of collision with any or all of the cars which were involved in the accident. And it seems plain that any car which struck the horse before it could be released from the perilous position in which it was placed was involved in the transaction complained of. If the defendant had been in doubt as to what particular car was referred to in the complaint, the language of the complaint being so comprehensive as to embrace more than one car, a motion to make more defi-

nite and certain would have been the appellant's remedy, and it would have been the duty of the court to have compelled the plaintiff to furnish the defendant with the necessary information on this subject. But no such motion was made. The defendant contenting itself simply with an objection to the admission of the testimony. Section 420 of Pierce's Code (Bal. Code, § 4949), provides that:

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and, thereupon, the court may order the pleading to be amended upon such terms as shall be just."

This court, in construing this section of the statute, has uniformly held that it avails the litigant nothing to show a variance between his adversary's pleadings and proof without showing a resulting injury, and it must appear that he was misled to his prejudice in maintaining his action or defense upon the merits; and that, whenever it is alleged that a party has been misled, that fact must be proved to the satisfaction of the court, whose duty it would be to order the pleadings to be amended upon such terms as would be just. *Dudley v. Dural*, 29 Wash. 528, 70 Pac. 68; *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156; *Mercier v. Travelers' Ins. Co.*, 24 Wash. 147, 64 Pac. 158. We think no reversible error was committed by the court in admitting the testimony complained of.

The testimony admitted having been competent testimony, it is frankly admitted by the appellant in its brief that the respondent's evidence with respect to the second collision made out a case of the clearest and most culpable negligence for which no fair-minded person could find the least shadow of excuse. That being true, and the jury having found against the appellant on its contention of contributory negli-

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Citations of Counsel.

gence, and no error having been committed by the court in any other respect, the judgment will be affirmed.

FULLERTON, RUDKIN, MOUNT, and ROOT, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[No. 7413. Decided November 7, 1908.]

JIMERSON HAMILTON *et al.*, Appellants, v. HARRIET P.
WITNER *et al.*, Respondents.¹

ADVERSE POSSESSION—COLOR OF TITLE—VOID GUARDIAN'S DEED. An irregular or void guardian's deed in partition proceedings constitutes color of title, within the meaning of the seven-year statute of limitations, Bal. Code, § 5503, where land is held under color of title and payment of taxes.

COSTS—COPIES OF RECORDS—TRIAL ON AGREED FACTS. Costs may be allowed for certified copies of deeds and records necessarily prepared before the trial, although subsequently the case was submitted on an agreed statement of facts.

APPEAL—EXCEPTIONS—COSTS—REVIEW—MOTION TO RETAX—NECESSITY. Objection to judgment for costs against plaintiff's sureties on a cost bond, upon dismissal of an action of ejectment, may be first made on appeal without moving below to retax the costs, as no exceptions to a judgment are necessary.

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY. The jurisdiction of the supreme court on appeal from a judgment for costs on dismissal of an action of ejectment is not affected by the amount in controversy, as only actions for the recovery of money or personal property are controlled thereby.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 23, 1908, in favor of the defendants, upon an agreed statement of facts, dismissing on the merits an action of ejectment. Affirmed on plaintiff's appeal and reversed on the sureties' appeal.

F. C. Kapp and Elias A. Wright, for appellants, contended, among other things, that the order of sale was void

¹Reported in 97 Pac. 1084.

for want of jurisdiction. Code of 1881, §§ 1840, 1841, 1620; 21 Cyc. 122; *Stern v. Sill*, 39 Wash. 557, 81 Pac. 1007; *Glasgow v. McKinnon*, 79 Tex. 116, 14 S. W. 1050. The pretended order of sale would also be void for want of jurisdiction, for the reason that the minors were not properly before the court. 21 Cyc. 33; *In re Brien's Estate*, 11 N. Y. Supp. 522; *Smith v. Dudley*, 16 N. C. 354; *Lahiffe v. Hunter*, 1 Harp. (S. C.) 184; *Dormitzer v. German Sav. & Loan Society*, 23 Wash. 132, 62 Pac. 862; *Wallace v. Grant*, 27 Wash. 130, 67 Pac. 578; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099. The lack of jurisdiction appearing of record, the order may be attacked collaterally. *Johnson v. Hunter*, 147 Fed. 133; *Beatty v. Davenport*, 45 Wash. 555, 88 Pac. 1109; *Stark Brothers v. Royce*, 44 Wash. 287, 87 Pac. 340; *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064. The action was not barred by statute. *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602; *Ball v. Clothier, supra*; *Moore v. Brown*, 11 How. 414, 13 L. Ed. 751; *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141. The defendant must be in possession under claim and color of title. *Wright v. Mattison*, 18 How. 50, 15 L. Ed. 280; *May v. Sutherlin*, 41 Wash. 609, 84 Pac. 585; *Moore v. Brown, supra*; *Coulter v. Stafford*, 56 Fed. 564; *Bullene v. Garrison*, 1 Wash. Ter. 587; *Territory v. Klee*, 1 Wash. 183, 23 Pac. 417; *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982. The assertion of color of title must be made in good faith. *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936; *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497; *Wells v. Walker*, 29 Ga. 450; *Vattier v. Hinde*, 7 Pet. 252, 8 L. Ed. 675; *Sampeyreac v. United States*, 7 Pet. 222, 8 L. Ed. 665; *Dodge v. Briggs*, 27 Fed. 160; *Texas Lumber Mfg. Co. v. Branch*, 60 Fed. 201, 8 C. C. A. 562; *Lindblom v. Rocks*, 146 Fed. 660; *Brodack v. Morsbach*, 38 Wash. 72, 80 Pac. 275; *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675.

Frank Groundwater and W. H. Abel, for respondents.

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HADLEY, C. J.—This is an action in ejectment, brought by the appellant Hamilton against the defendants. The defendants moved for a bond for costs, which was given, with appellants Henderson and Harris as sureties thereon. The cause was tried upon an agreed statement of facts, the essential facts being as follows: On March 9, 1877, the plaintiff's father and mother resided in Thurston county, Washington Territory, and they were then the owners in fee simple, by title deducible of record from the United States, of certain real estate, situate in Chehalis county, Washington, described as the east half of the southeast quarter of section 33, and the west half of the southwest quarter of section 34, all in township 18, north, range 6 west of the Willamette Meridian. On said day, still owning the land as aforesaid, the plaintiff's father died intestate, leaving surviving him as his sole heirs at law his widow and three minor children of whom the plaintiff was one, he having been born May 18, 1876. Thereafter the estate of plaintiff's father was administered in the probate court of Thurston county, which court had full jurisdiction, and in the administration proceedings an order of distribution was made on the 24th day of April, 1882, whereby an undivided one-half of the aforesaid land was distributed to the widow and one-sixth to each of the three minor children. Some time prior to the decree of distribution, the widow and minor children moved from Thurston county, and established their residence upon the said land in Chehalis county, and continued to live there until dispossessed by one Axford as hereinafter stated.

Subsequent to the decree of distribution, certain proceedings were had in the probate court of Chehalis county, whereby the mother of the minor children was appointed their guardian. In the meantime the mother had remarried, and her appointment and qualification as guardian was under the name of Sarah J. Morton. As guardian she filed an inventory showing her three wards to be the owners of an undivided

one-half of this land. Thereafter the guardian petitioned the probate court for an order to sell the real estate of her wards. An order to show cause was made. The same came on for hearing at the time fixed by the court, and the guardian then appeared in person and moved "to vacate said petition," which motion was granted. On the same day the mother filed a petition in the probate court, asking a partition of the land. The paper was not entitled as in the guardianship proceedings, but was designated as "In the matter of the estate of Jimerson Hamilton, deceased." Thereafter such proceedings were had that the court appointed three persons to make partition and division of the land, and these reported that the division could not be justly made. Whereupon the court made an order in which it was recited that the petition for partition was filed "in the matter of the estate and guardianship of the minor children," and the guardian was ordered to sell the land. Notice of such sale was given by the guardian, as directed by the court, and the sale of this particular land was made by her as guardian to W. R. Axford, for the consideration of \$800 cash. The sale was approved and affirmed by the court, and the guardian was ordered to execute a deed to the purchaser, which she did September 30, 1882. The purchaser Axford went into possession on the same day, and he and his grantees, including the defendants, have ever since been in the actual exclusive, open, notorious, and adverse possession, asserting title to the land in fee simple under said sale, and they have paid all taxes thereon from year to year as the same came due. They have treated the property as their own, cultivated the land, and have at all times since September, 1882, enjoyed all the income and profits arising therefrom.

From the above facts the court concluded that, at all times since September 30, 1882, the defendants or their grantors have been in the adverse possession of the land, claiming in good faith to be its owners, and that said possession at all times has been and still is under claim of right and color of

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title deducible of record from the United States. Judgment was entered in favor of the defendants dismissing plaintiff's action, without right to further prosecute. Judgment for costs was also entered against the sureties upon the cost bond. The plaintiff and also the sureties have appealed.

This suit was commenced May 6, 1907, which was twelve days before the expiration of ten years following the date that the appellant attained his majority. It is therefore claimed that the action is not barred by the general ten-year statute of limitations, for the reason that it was brought within ten years from the time of the removal of the appellant's disability, in accordance with Bal. Code, § 4809 (P. C. § 293). We have, however, nothing to do with the ten-year statute, if respondents are entitled to the benefits of Bal. Code, § 5503 (P. C. § 1660). That section is as follows:

"Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

It is admitted by appellant that, if respondents' possession and that of their grantors has been and is under claim and color of title in good faith, then the judgment is right. It is, however, contended that the facts do not show the existence of color of title in favor of respondents and their grantors. It is argued that the court proceedings in Chehalis county show that the guardian's deed to respondents' grantor was void, and that it did not for that reason constitute color of title. The record, it is true, shows a rather singular admix-

ture of the guardianship and the partition proceedings, the aid of the probate court having apparently been invoked for the latter proceeding, if it was intended as such. The court, however, declared in its order of sale that the so-called partition petition was filed in the guardianship matter, and the order of sale purports to have been made in that matter. The probate court of Chehalis county has jurisdiction of the subject-matter of the guardianship, with which matter we think a fair interpretation of the record shows that the court was all the time intending to deal. The proceedings were undoubtedly irregular, but respondents contend that the deed was simply voidable and not void. Assuming appellant's position, however, that the proceedings were such as to render the deed a void one, still we think the decided weight of authority is that, especially under such statutes as ours, § 5503, *supra*, even a void deed constitutes color of title where possession and claim of title are in good faith made under it, coupled with the payment of taxes. Speaking generally upon this subject of color of title, we find the following statement in 1 Cyc. 1093:

"A deed executed under and by virtue of a judgment or decree gives color of title, although such judgment or decree is voidable or absolutely void. As a general rule, deeds executed in pursuance of a sale give color of title, although the sale be irregular or void."

In support of the above statement citations are made referring to the decisions of twenty-two states, and also to decisions of the United States supreme court and other Federal cases. With reference to the policy and reasons for this rule the supreme court of the United States in *Pillow v. Roberts*, 13 How. 472, 14 L. Ed. 228, said:

"Statutes of limitation are founded on sound policy. They are statutes of repose and should not be evaded by a forced construction. . . . Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title, even

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under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course, adversely to all the world."

Judge Dillon gave expression to the same view in *Miller v. Sullivan*, 4 Dillon (U. S.) 340, as follows:

"This is a wise statute, doubly wise in a new country, for reasons which fully appear in this case. It would be robbed of its virtue if it was confined to cases where the sale was valid, for such sales do not need the protection of such a statute. 'They that are whole need no physician.'"

This court expressed the same view long ago and held that a void tax deed constitutes color of title as the basis for the running of the statute of limitations. *Ward v. Higgins*, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285. It was there said:

"We are aware that there are cases holding that a void tax deed will not constitute a basis for the running of the statute of limitations. But we think such decisions overlook both the philosophy and the object of such statutes. Statutes of limitation are strictly statutes of repose, and the policy upon which they are founded is, that a reasonable lapse of time shall put an end to legal strife and controversy, and that he who neglects or refuses to assert his rights within such a time as the legislature may deem reasonable shall be conclusively presumed to have waived them. If it is necessary for one claiming the benefit and protection of the statute to first prove a perfect and indefeasible title, it is impossible to perceive for what purpose such statutes are enacted. A perfect title needs no extraneous aid, and if imperfect ones are not within the purview of the statute, then the law, in either case, is entirely ineffectual and useless, and might well be eliminated from the body of statutes."

The supreme court of the United States recognized such to be the rule in this state in its decision in *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 16 Sup. Ct. 939, 41 L. Ed. 72. In Illinois where a statute similar to our seven-year statute exists, it is held that where one pays the taxes for seven years and in good faith holds possession under even a void deed,

such deed becomes color of title. *Nelson v. Davidson*, 160 Ill. 254, 43 N. E. 361. The same rule was recognized in *Clayton v. Feig*, 179 Ill. 534, 54 N. E. 149, where it was held, however, that the defense failed for failure to prove clearly the payment of taxes. In *O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. (N. S.) 354, the defendant had been in possession for eight years under a void administrator's sale, and it was held that the void deed, together with possession, supported the running of the statute of limitations. An extensive foot note in 8 L. R. A. states that the weight of the authority is in accord with the above decision, and numerous citations are there collated all to the effect that a purchaser in possession for the statutory period will be protected, even though the proceeding leading up to the sale or the sale itself is void. In *Philadelphia Mortgage & Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501, it was held that an invalid or void sheriff's deed, when possession was taken and title was in good faith asserted thereunder, gave color of title sufficient to start in motion the statute of limitations.

In view of the foregoing authorities, it must be held here that the guardian's deed in the case at bar, even though it may have been void, became color of title within the meaning of our statute. Possession was taken under it in good faith under a claim of right and of title, and that possession was maintained and the taxes paid by respondents and their grantors from year to year continuously for about twenty-five years before this suit was brought. This constituted ownership in respondents under § 5503, *supra*, to the extent and according to the purport of their paper title. Their paper title purports to be a fee simple one, and their ownership is accordingly.

Appellants urge that the court erred in denying their motion to retax certain costs. In preparing for the trial, respondents obtained certified copies of deeds and other records to be used in evidence. Before the trial, however, a stipulation was made as to the facts, the facts shown by the copies

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being embodied in the stipulation. We think, under such circumstances, respondents are entitled to recover the costs of such copies. It was necessary for them to prepare in a timely way for trial, and the fact that an ante-trial agreement as to the facts was afterwards reached did not avoid the necessity for the expenditure at the time it was made, in the exercise of proper diligence.

Appellants Henderson and Harris have appealed for the reason that judgment for costs was entered against them as sureties on the cost bond. Respondents concede that this was error, but maintain that the question cannot be raised here for the reason that it was not raised below by motion to retax, and for the further reason that the amount is below \$200. The question did not arise until the entry of judgment, and under Bal. Code, § 5051 (P. C. § 668), it is not necessary to except to the judgment itself. See, also, *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501. With reference to the amount involved, we think the \$200 limitation does not govern here. This is not an action at law for the recovery of money or personal property where the original amount in controversy or the value of the property does not exceed \$200. The judgment for costs against the sureties being admittedly wrong, must therefore be reversed, and the appellants Henderson and Harris are entitled to recover their necessary costs on the appeal. The judgment against appellant Hamilton is in all respects affirmed.

RUDKIN, MOUNT, DUNBAR, and CROW, JJ., concur.

FULLERTON and ROOT, JJ., took no part.

[No. 7117. Decided July 11, 1908.]

PORTLAND AND SEATTLE RAILWAY COMPANY, *Plaintiff*, v. COLUMBIA VALLEY RAILROAD COMPANY *et al.*, *Defendants*.¹

Appeal from a judgment of the superior court for Skamania county, McCredie, J., entered May 31, 1907. Affirmed.

James B. Kerr and *A. L. Miller*, for plaintiff.

W. W. Cotton and *Ralph E. Moody*, for defendants.

PER CURIAM.—Counsel having stipulated that this case presents the same questions as were involved in the case of the *Columbia Valley R. Co. v. Portland & Seattle R. Co.*, 48 Wash. 472, 93 Pac. 1067, and that this case should be considered on the briefs filed and arguments presented in that case, the judgment is affirmed for the reasons there stated.

[No. 7147. Decided July 16, 1908.]

PETER BERG, *Appellant*, v. RUBY MINING COMPANY, *Respondent*.²

Appeal from a judgment of the superior court for Okanogan county, Steiner, J., entered July 1, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for conversion. Affirmed.

E. W. Taylor, for appellant.

Myron A. Folsom and *E. K. Pendergast*, for respondent.

PER CURIAM.—Action by Peter Berg, plaintiff, against the Ruby Mining Company, a corporation, defendant, to recover the value of certain ores alleged to have been taken from ground included within mining claims of the plaintiff. The defendant denied that plaintiff owned the ground from which the ores had been taken. By cross-complaint it asked to have its title quieted in and to mining claims owned by it, which included the ground in dispute. From a judgment in favor of the defendant, the plaintiff has appealed.

The appellant owns the Boston Boy and Rush mining claims, in the Similkameen mining district, in Okanogan county, Washington, and the respondent owns the Crescent and Labyrinth claims in the same district. Appellant's claims were originally located by his

¹Reported in 96 Pac. 1119.

²Reported in 96 Pac. 683.

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predecessors in 1891, and relocated by him, by amended locations and notices, in 1905. Respondent's claims were originally located by its predecessors in 1902, and relocated by it, by amended locations and notices, in 1904. These locations of the respective parties being in conflict, the principal issue between them is whether the appellant or respondent owns the disputed territory.

The trial court in substance found that, for more than ten years last past, the appellant and his predecessors in interest have been the owners of the Boston Boy and the Rush mining claims, the same being located within certain boundary lines as contended by respondent; that neither the appellant nor his predecessors in interest have at any time been in possession of, or entitled to, any of the disputed ground involved in this action; that neither the respondent nor any of its officers, agents, or employees have at any time entered upon either the Boston Boy or Rush claims, except a small portion of the latter hereinafter mentioned; that they have taken no ores from underneath the surface of appellant's claims; that a small portion of the west end line and the south end line of the Crescent claim owned by respondent was projected over a small portion of the Rush claim owned by appellant; but without damage to the Rush claim, no ores having been taken therefrom; and that the respondent, Ruby Mining Company, is the owner of, is in possession of, and is entitled to the possession of, the Labyrinth and Crescent mining claims on the east side of Mount Chopaca, Okanogan county, Washington, as shown by its amended locations and amended location notices, save and except a small portion of the Crescent claim which, as above mentioned, had been previously located and appropriated by appellant and his predecessors as a part of the Rush claim. Upon these findings, judgment was entered dismissing the appellant's action, and quieting respondent's title to the Labyrinth and Crescent claims, except that small portion of the latter which extended over the Rush claim.

There being no substantial conflict between the parties on questions of law, the controlling question on this appeal is whether the findings and decree are sustained by the evidence. The trial judge saw the witnesses, heard them testify, passed upon their credibility, and at the request of both parties visited the mining claims and made an inspection of the territory in dispute. Having ourselves examined and considered the evidence, which is voluminous and conflicting, we conclude that its clear preponderance sustains the findings of the trial judge, and the final judgment entered thereon.

The judgment is affirmed.

[No. 7351. Decided August 6, 1908.]

MARY M. MILLER *et al.*, Appellants, v. N. B. COFFMAN *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 9, 1908. Affirmed.

Blaine, Tucker & Hyland and *James B. Kinne*, for appellants.

Millett & Harmon and *Hayden & Langhorne*, for respondents.

PER CURIAM.—The question for decision in this case is the same as that presented in the case of *Miller v. Henderson*, ante p. 200, 96 Pac. 1052, and for the reasons therein stated will stand affirmed.

[No. 7322. Decided August 6, 1908.]

CHARLES G. SCOTT, Respondent, v. LOYAL YOUNG, Appellant.²

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 19, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Larrabee & Wright, for appellant.

Wm. Parmerlee and *L. J. Rickard*, for respondent.

PER CURIAM.—The respondent brought this action to recover upon a promissory note executed by the appellant and purchased by the respondent before maturity. The defense was that the note was without consideration and procured by fraud by the payee therein named; that the respondent was not an innocent purchaser, and had knowledge of the facts surrounding the execution and delivery of the note to the payee. This affirmative defense was the main question of fact at the trial. The court found in favor of the respondent, and rendered judgment for the amount of the note, viz.: \$300, and interest from maturity.

It is claimed that the court erred in finding that the respondent was an innocent purchaser for value before maturity. The evidence is in conflict upon this point, but we think the weight is in favor of the finding. The judgment must therefore be affirmed.

¹Reported in 96 Pac. 1054.

²Reported in 96 Pac. 1038.

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Opinion Per Root, J.

[No. 7269. Decided September 24, 1908.]

EDWIN LEARNED *et al.*, *Appellants*, v. J. M. IMAN, *Respondent*.¹

Appeal from a judgment of the superior court for Skamania county, McCredie, J., entered September 7, 1907, in favor of the defendant, after a trial before the court without a jury, dismissing an action for specific performance. Affirmed.

A. L. Miller, for appellants.

George E. O'Bryon (R. A. Wade and O. P. M. Jamison, of counsel), for respondent.

Root, J.—This is an action brought by appellants, who were plaintiffs below, to enforce specific performance of a contract of sale of real estate situated in Skamania county. From a judgment dismissing the action, plaintiffs have appealed.

The property in question was originally the community property of respondent's parents. It was the contention of appellants that respondent had entered into an oral contract with appellant Edwin Learned whereby appellants were to pay him \$1,500, as he might need the money, for the purchase of other interests in the property in question, and he in return was to give them a half interest in the place. Appellants concede that, in order to prevail, they must establish the following points: (1) That there was an oral agreement to sell; (2) that there was such a part performance by the appellants as would take the case out of the statute of frauds and require a decree for specific performance; (3) that appellants had not committed any breach of the agreement; (4) that at the time of the beginning of this action respondent was able to perform on his part.

The issues involved are principally those of fact, and the burden was upon the appellants to establish the propositions which have been mentioned. In the case of *O'Connor v. Jackson*, 23 Wash. 224, 62 Pac. 761, this court quoted with approval the following language from *Warvelle on Vendors Liens*, vol. 2, page 783, to wit:

"It is a well established rule that the primary inquiry in all cases when enforcement is sought of a parol agreement for the conveyance of land goes to the existence of the contract itself, and before anything can be shown relative to its fulfillment, all its terms and conditions must be clearly and definitely established by unequivocal and convincing proof. If the evidence fails to establish the contract as alleged, or if any of its terms are left in doubt or uncertainty, or if any material part of it still rests in treaty or remains to be settled by further negotiations, it will not be specifically enforced. It must be further made to appear that the terms and stipulations of the contract have been relied on by the party seeking its enforcement."

See, also, *McKay v. Calderwood*, 37 Wash. 194, 79 Pac. 629; *Purcell v. Miner*, 4 Wall. 513, 18 L. Ed. 435.

¹Reported in 97 Pac. 449.

The evidence of the respective parties was conflicting upon the principal material questions. To review and analyze it would require more space than we think justifiable. We think it justifies the conclusion reached by the trial court, and remembering, also, that the trial court had the advantage of the presence of the parties and the witnesses while testifying, we are not disposed to disturb its conclusion. The judgment will therefore be affirmed.

HADLEY, C. J., RUDKIN, FULLERTON, and MOUNT, JJ., concur.

DUNBAR and CROW, JJ., took no part.

[No. 7249. Decided September 28, 1908.]

IDA M. JOHNSON *et al.*, *Respondents*, v. O. D. JOHNSON *et al.*,
Appellants.¹

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered July 29, 1907, upon findings in favor of the plaintiffs, after a trial before the court, in an action to quiet title. Affirmed.

Williams & Grimsshaw and *Ira Thomas*, for appellants.

Reeves & Reeves, for respondents.

Root, J.—This is an action brought by respondents to require appellants to execute and deliver to them a warranty deed for the south sixty feet of the north half of lot 4, block 21, in Suburban Home Addition to Wenatchee, Washington, and to require them to deed an undivided one-half interest in lot 32, block 12, Great Northern plat of the city of Wenatchee. From a decree of the trial court finding that respondents were the rightful owners of the property involved and entitled to a conveyance thereof, and directing said conveyance to be made, this appeal is prosecuted by the defendants.

Appellants are husband and wife. Respondent Ida M. Johnson is the widow of John Alvis Johnson, son of the appellants, and the respondent Alta Margaret Johnson is the daughter of Ida M. Johnson. In 1895, O. D. Johnson and John Alvis Johnson opened a repair shop and jewelry store in Wenatchee, and were for a time partners therein. In the year 1899, the firm contracted to purchase lot 32, of block 12, Great Northern plat, and prior to the death of John Alvis Johnson a deed was received to said property. In 1900, O. D. Johnson entered into a contract with the Wenatchee Development Company to purchase the south half of lot 1 and the north half of lot 4, in block 24, Suburban Home Addition to Wenatchee, excepting a strip of thirty feet on the easterly side of said lots, and subject to the right of irrigation of the Wenatchee Water Power Company, said tract containing a fraction less than two acres. It is claimed by respondents that this contract was made with an understanding

¹Reported in 97 Pac. 452.

Oct. 1908]

Opinion Per Curiam.

between O. D. Johnson and John Alvis Johnson that the latter should have a sufficient portion thereof upon which to build a house for himself and family. In 1901 the defendants erected a house on the northerly side of said premises, and John Alvis Johnson and wife erected a house on the southerly portion thereof. The controversy in this case is as to whether or not it was the intention of the parties that this portion of the premises upon which John Alvis Johnson and wife built their house was intended to be their property. The evidence in some particulars is conflicting, but there is much evidence of statements made by appellant O. D. Johnson, and of a course of conduct followed by him, which tends strongly to show that respondents' contention is correct, and which statements and course of conduct are inconsistent with the claim now put forth by appellants.

We do not think it would serve any good purpose to discuss the evidence at length. The trial court had the advantage of the presence of the parties and their witnesses, and also made a personal examination of the premises, and we think that the evidence found in the record sustains its findings and conclusions. The decree is therefore affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, and MOUNT, JJ., concur.

DUNBAR and CROW, JJ., took no part.

[No. 7265. Decided October 15, 1908.]

CLARENCE H. CHILDS *et al.*, Appellants, v. ALDEN J. BLETHEN,
*Respondent.*¹

Appeal from a judgment of the superior court for King county, Frater, J., entered September 10, 1907, upon findings in favor of the defendant, after a trial before the court without a jury, in an action upon a judgment. Affirmed.

Shank & Smith, for appellants.

Bausman & Kelleher, for respondent.

PER CURIAM.—This is an action on a judgment rendered against the respondent in the state of Minnesota. The respondent answered, alleging payment and denying jurisdiction in the Minnesota court. The case was tried to the court without a jury. The court found that the defendant in the action, the respondent here, had never been served, and that the judgment was rendered without jurisdiction and was therefore void; and rendered judgment in favor of respondent for costs.

We have carefully examined the record in this case, and have reached the conclusion that the findings and judgment of the trial judge are justified by the testimony, and the judgment is therefore affirmed.

¹Reported in 97 Pac. 1135.

[No. 7435. Decided October 15, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. S. R. DAVIS, *Appellant*.¹

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered April 21, 1908, upon a trial and conviction of the violation of an ordinance regulating peddlers. Reversed.

E. B. Dufur, for appellant.

A. J. Allen, for respondent.

PER CURIAM.—The facts and legal questions involved in this cause are identical with those involved in *State v. Glasby*, ante p. 598, 97 Pac. 734. For the reasons stated in the opinion in the last mentioned case, the judgment in this cause is reversed, and the case is remanded with instructions to vacate the judgment, dismiss the action, and discharge the defendant.

[No. 7617. Decided October 15, 1908.]

ANNIE HARRIS *et al.*, *Respondents*, v. PUGET SOUND ELECTRIC RAILWAY COMPANY, *Appellant*.²

Motion to dismiss an appeal from a judgment of the superior court for King county, Albertson, J., entered April 17, 1908, upon the verdict of a jury rendered in favor of the plaintiff in an action for personal injuries. Denied.

James B. Howe and *Hugh A. Tait*, for appellant.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for respondents.

PER CURIAM.—Motion to dismiss appeal. On the authority of the opinion in *Sipes v. Puget Sound Electric R. Co.*, ante p. 585, 97 Pac. 723, the motion to dismiss is denied.

[No. 7443. Decided November 7, 1908.]

SADIE SILVERSTONE *et al.*, *Respondents*, v. B. T. TOTTEN *et al.*,
Appellants.³

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 19, 1908. Affirmed.

I. H. Randolph, for appellants.

Edward Judd, for respondents.

PER CURIAM.—The questions of law and fact in this case are identical with the questions involved in the case of *Silverstone v. Totten*, ante p. 447, 97 Pac. 491, and on the strength of that decision and the stipulation of counsel, the judgment herein is affirmed.

¹Reported in 97 Pac. 737.

²Reported in 97 Pac. 728.

³Reported in 97 Pac. 1135.

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49. **APPEAL—HARMLESS ERROR—FACTS OTHERWISE ESTABLISHED.** Where, in an answer to the question as to the kind of timber on plaintiff's land, he made a statement of the kinds, "and quite a bit of cedar too," it is not error to refuse to strike out the answer, the amount of cedar being subsequently shown. *Johnson v. Northport Smelting and Refining Co.*..... 567
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51. **APPEAL—REVIEW—HARMLESS ERROR.** It is not error to exclude the answer to a question that has already been answered. *State v. Gilluly* 1

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53. **APPEAL AND ERROR—DECISION—TRIAL—WAIVER OF NONSUIT.** The waiver of a nonsuit by proceeding with the trial, after exception taken, only allows the plaintiff the benefit of evidence thereafter introduced; and where the defects in plaintiff's case are not cured thereby, the nonsuit may, on proper assignment of error, be granted on appeal. *Dimuria v. Seattle Transfer Co.*..... 633
54. **APPEAL—DECISION—REMAND.** Upon the reversal of a judgment for failure to submit to the jury the questions of fact, a new trial must be ordered. *Jasper v. Bunker Hill & Sullivan Mining & Concentrating Co.* 570

APPEAL AND ERROR—CONTINUED.

55. **APPEAL—DECISION—LAW OF CASE—MANDATE—COMPELLING ENTRY OF JUDGMENT.** Where a case is remanded on appeal with directions to enter judgment in a specified amount, and no modification is requested in the appellate court, the judgment becomes the law of the case; and where the trial court is about to add interest thereto, mandamus lies to compel entry of the judgment as directed. *German-American State Bank v. Sullivan*..... 42

APPEARANCE:

Of ward as conferring jurisdiction to discharge guardian, see **GUARDIAN AND WARD.**

APPOINTMENT:

Of receiver for partnership, insufficiency of showing, see **PARTNERSHIP.**

APPORTIONMENT:

Of expenses or benefits of public improvements, see **MUNICIPAL CORPORATIONS, 7.**

ARTESIAN WELLS:

Diversion of waters, see **WATERS AND WATER COURSES.**

ASSAULT:

Liability of carrier for acts of employee in ejecting or assaulting passenger, see **CARRIERS, 5, 6.**

ASSESSMENT:

Of damages, nominal damages, see **EMINENT DOMAIN, 5.**

Of expenses of public improvements, see **HIGHWAYS, 3.**

For public improvements, see **MUNICIPAL CORPORATIONS, 3-11.**

Of tax, see **TAXATION, 6.**

ASSIGNMENT:

Of lease, see **LANDLORD AND TENANT.**

ASSOCIATIONS:

See **BENEFICIAL ASSOCIATIONS.**

Mutual benefit insurance associations, see **INSURANCE, 4.**

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT, 10-13, 21.**

ATTORNEY AND CLIENT:

Service of notice of appeal on attorney, see **APPEAL AND ERROR, 23.**

Assistance of private counsel in criminal prosecution, see **CRIMINAL LAW, 2.**

Attorney's fees on foreclosure of lien on logs, see **LOGS AND LOGGING, 3.**

AUTHORITY:

- Of bank officers, see **BANKS AND BANKING**, 4.
- Of broker, see **BROKERS**, 2.
- Of sheriff to take possession of property upon foreclosure of mortgage, see **CHattel Mortgages**, 3.
- Of corporate agent, see **CORPORATIONS**, 1.
- Of agent, see **PRINCIPAL AND AGENT**.
- Of state dental board to employ private counsel, see **STATES**, 1.

AWARD:

- Of county contracts, see **COUNTIES**, 2.

BANKRUPTCY:

- Right of trustee to costs as against insolvent's estate, see **COSTS**, 2.
- 1. **BANKRUPTCY—COURTS—JURISDICTION—RECEIVERS.** After the appointment and qualification of a receiver in a state court, the appointment of a trustee in bankruptcy by the Federal court does not deprive the state court of jurisdiction, or the receiver of the right to possession of the property. *Springer v. Ayer*..... 642

BANKS AND BANKING:

- Condition precedent to action against bank, see **ACTION**.
- 1. **BANKS AND BANKING—BRANCH BANKS—STATUTES—CONSTRUCTION.** Under Laws 1907, p. 518, defining "branch banks" to mean any branch established at a city or town other than that in which the principal office is located, and defining "bank" to include foreign banks transacting banking business in this state, the term "branch banks" is not to be confined to branches of foreign banks only; but a domestic bank is authorized to establish branches, especially in view of other sections enumerating the powers of "any corporation, branch bank or foreign bank," etc. *State ex rel. Flumerfelt v. Engle* 207
- 2. **BANKS AND BANKING—CERTIFICATE OF DEPOSIT—DEFENSES—ESTOPPEL TO ASSERT.** Where a bank, upon inquiry, assures an indorser of a certificate of deposit, issued by the bank to one of its customers, that the same will be paid upon presentation, whereby the indorser and holder were lulled into a feeling of security and prevented from taking steps to protect themselves, the bank is estopped to assert any defense against the holder of the certificate, where it may be reasonably inferred that the occurrence was communicated to the holder and both the holder and indorser were interested therein at the time. *Old National Bank v. Exchange National Bank*..... 418
- 3. **BANKS AND BANKING—CONTRACTS—AGREEMENT TO ACCEPT CHECKS AS CASH—EVIDENCE—FINDINGS—SUFFICIENCY.** The president and cashier of the defendant bank agreed to accept checks for \$10,000 as cash and credit the same to a new bank about to be organized, where it appears that the checks were given as payment for sub-

BANKS AND BANKING—CONTINUED.

scriptions to stock in the new bank, to enable it to perfect its organization and do business; that, although the drawers of the checks had no funds in the defendant bank, its cashier stated to the incorporators of the new bank that the checks were good and would be paid; and that defendant bank made statements showing that the amount was credited to the account of the new bank, and so represented it to the stockholders thereof. *Kimball v. Farmers & Mechanics Bank* 610

4. **SAME—REPRESENTATION BY OFFICERS—AUTHORITY TO MAKE LOANS—CUSTOM.** The president and cashier of a bank are authorized to accept checks for \$10,000 as cash, and credit the same to a new bank, although the drawers had no funds, the checks having been given in payment of subscriptions to the stock of the new bank, where it appears that in several years the board of trustees and the executive committee had each held only three meetings, that at none of the meetings was any question of loans acted upon, and the entire management was left to the president and cashier, who customarily loaned out large sums without consulting the trustees or executive committee. *Kimball v. Farmers & Mechanics Bank*..... 610

BAR:

Abandonment of proceedings as bar to subsequent proceedings to condemn street, see **EMINENT DOMAIN**, 11.

Judgment declaring majority of ward as bar to action to set aside conveyance on ground of minority, see **GUARDIAN AND WARD**.

Of action by former adjudication, see **JUDGMENT**, 10.

Of action by limitation, see **LIMITATION OF ACTIONS**, 2.

BENEFICIAL ASSOCIATIONS:

Mutual benefit insurance association, see **INSURANCE**, 4.

1. **BENEFICIAL ASSOCIATIONS—MEMBERSHIP—EXPULSION—NOTICE OF HEARING.** A mutual benefit society has no power to expel a member without giving him notice and an opportunity to be heard. *State ex rel. Cicoria v. Corgiat*..... 96
2. **BENEFICIAL ASSOCIATIONS—REVISION OF ACTS—JURISDICTION OF COURTS.** The courts are compelled to revise acts of beneficial societies where pecuniary and property rights have been illegally abridged or invaded. *State ex rel. Cicoria v. Corgiat*..... 96

BENEFITS:

To property not part of that taken, see **EMINENT DOMAIN**, 4.

Assessment of benefits caused by construction of public improvements, see **MUNICIPAL CORPORATIONS**, 3-11.

BENEFIT SOCIETIES:

See **BENEFICIAL ASSOCIATIONS**.

BIDS:

Contracts with county, see COUNTIES, 2.

BILL OF SALE:

See CHATTEL MORTGAGES, 1, 2.

BILLS AND NOTES:

Accrual of liability on indemnity bond, note given by assured in payment of judgment obtained, see INDEMNITY.

Amendment of pleading, see PLEADING, 4.

1. **BILLS AND NOTES—ACTIONS—COMPLAINT—CONDITIONAL MATURITY.**

Where a note contained the signed indorsement of the maker that he would pay the same on demand "should I make a transfer of my real estate before this note becomes due," a complaint in an action commenced before maturity is good as against a demurrer, where it sets out the note and alleges, in the language of the indorsement, a transfer of the maker's real estate, and that the note is now due and payable. *Loveday v. Parker*..... 260

2. **BILLS AND NOTES—PAYMENT—EVIDENCE—SUFFICIENCY.**

Where a note was given to a real estate agency for earnest money advanced on behalf of the maker, a prospective purchaser of real estate, who afterwards procured another to take the contract off his hands, and the deal was finally closed and the new purchaser returned to the agency the money for which the note was given, the note was there- by paid. *Sutherland v. Pallister*..... 552

BONA FIDE PURCHASER:

Of property fraudulently conveyed, see FRAUDULENT CONVEYANCES.

BONDS:

Effect of bond staying execution on right to appeal from judgment, see APPEAL AND ERROR, 5.

On appeal, see APPEAL AND ERROR, 20, 21.

BRANCH BANKS:

Establishment of, see BANKS AND BANKING, 1.

BREACH:

Of contract granting exclusive agency to sell land, see BROKERS, 1.

Of conditions in insurance policy, see INSURANCE.

Of contract to sell land, measure of damages, see VENDOR AND PURCHASER, 13.

BROKERS:

Recovery of commissions, see FRAUDS, STATUTE OF.

Ratification of contract by owner upon sale of land by broker, see VENDOR AND PURCHASER, 1.

BROKERS—CONTINUED.

1. **BROKERS — CONTRACTS — CONSTRUCTION — "EXCLUSIVE AGENCY" — BREACH—DAMAGES.** A contract whereby the owner gave the "exclusive agency" to sell land does not imply a reservation of the right of the owner to make sales, as in the case of a unilateral contract, where it appears that the parties were nonresidents and the land consisted of over fifty thousand acres, that the contract gave the second party, who made a specialty of such sales, the exclusive right to make sales for a period of three years, in consideration of which the second party agreed to put forth his best efforts to sell and agreed to pay all costs of advertising and sale and apply the proceeds, (1) to the payment of taxes (2) \$1.52 per acre to the owner, and (3) the balance to be equally divided, the second party to receive no other compensation or commission; hence the contract is broken by the owner's sale, within the three years, of the standing timber thereon, preventing the second party from making any sales, the land being chiefly valuable for its timber. *Hunter v. Wenatchee Land Co.* 438
2. **BROKERS — AUTHORITY — POWER TO SELL.** An employment of a broker to find a purchaser of real property does not authorize the broker to enter into a binding contract to sell. *Hardinger v. Columbia* 495

BUILDINGS:

Construction and performance of building contracts, see **CONTRACTS**, 2, 3.

BURDEN OF PROOF:

Breach of conditions in insurance policy, see **INSURANCE**, 3.

CANCELLATION OF INSTRUMENTS:

See **REFORMATION OF INSTRUMENTS**.

Rescission of contracts, see **SALES**.

Rescission of contract of sale of land, see **VENDOR AND PURCHASER**, 4, 5, 7.

1. **CANCELLATION OF INSTRUMENTS — FRAUD—PRINCIPAL AND AGENT—LIABILITY OF AGENT TO THIRD PERSON.** A complaint by mortgagors, who had deeded certain mortgaged premises to the mortgagee, states a cause of action for fraud in securing a conveyance of five acres of land not covered by the mortgage, where it appears that the defendant was the agent of the mortgagee, a nonresident, duly authorized to accept from the plaintiffs a deed of the mortgaged property in satisfaction of the debt, and that defendant, as such agent, without the knowledge of his principal, secured a deed from the plaintiffs to the five-acre tract, for his own use and benefit, by falsely representing that the mortgagee would not discharge the debt without such additional conveyance, and that, relying thereon, the plaintiffs made the deed to defendant's married daughter (who afterwards

CANCELLATION OF INSTRUMENTS—CONTINUED.

deeded to defendant) upon defendant's false representations that such third prson, unknown to plaintiffs, was the person to whom the mortgagee desired conveyance made. *Cook v. Skinner*..... 317

2. CANCELLATION OF INSTRUMENTS—DURESS—ANSWER—DEFENSES. In an action to set aside a conveyance on the ground of fraud and duress, an answer alleging a voluntary sale upon full consideration without fraud or duress states a good defense. *Mitchell v. Lidgerwood* 290

3. CANCELLATION OF INSTRUMENTS—CONTRACTS—RESCISSION—FRAUD—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant the rescission and cancellation of an assignment of a contract for city work, on the ground of fraud and misrepresentations as to the value of a note given therefor and the inability of the assignee to complete the work on time, where it appears that the note was perfectly good, no fraud was shown, and the contractors under the assignee were progressing rapidly with the work, which would be completed on time. *Kalberg v. Meade*..... 268

4. CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD—EVIDENCE—SUFFICIENCY. A quitclaim is properly set aside for fraud, where it appears that the grantee represented to the nonresident owner, while on a visit to the city, that the lots were unimproved and of little value and that he had lost title through foreclosure and sale of taxes (which were long delinquent), and that the grantee was the tax title holder when in fact he was not interested therein, and knew that the lots were valuable and had been improved by parties in possession under void tax proceedings; that the owner had not seen the lots and relied upon such statements and was not acquainted with their value, and without seeing the lots or knowing of his rights, made the quitclaim of property worth \$700, in consideration of \$40, with intent to clear up the title of the holder of the tax deed. *Squires v. Higginson* 364

CANDIDACY:

Declaration of for office of judge, failure to specify term, see ELECTIONS, 6.

CANDIDATES:

Nominations under provisions of primary election law, see ELECTIONS.

CARRIERS:

Injury by electricity through negligence of street car company, see ELECTRICITY.

CARRIERS—CONTINUED.

1. CARRIERS—INJURY TO PASSENGERS—SUDDEN JERKS—ACTIONS—INSTRUCTIONS. In an action against a street car company for injuries sustained by a passenger by reason of a sudden unusual jerk in starting, it is proper to refuse to instruct that some lurching or jerking was well known to be necessary for the operation of electric cars, and that plaintiff could not recover unless the court believed that there was lurching or jerking out of the ordinary, or such as would indicate negligent operation, where it was not claimed that the car could be operated without some jerking, and other instructions sufficiently recognized that the only issue for the jury relating to the movement of the car was whether the same was unusual. *Behling v. Seattle Electric Co.*..... 150
2. SAME—DEGREE OF CARE—INSTRUCTIONS. An instruction to the effect that a street car company is bound to exercise the highest degree of care reasonably practicable to see that an entering passenger has ample opportunity to be in a place of safety before starting the car, is not objectionable as declaring the rule that it is negligence *per se* to start a car before a passenger has secured a seat, where it is immediately followed by instructions making it clear that the questions before the jury were whether the plaintiff used reasonable care for her own safety and whether the company in starting the car exercised the highest degree of care reasonably practicable under the conditions existing. *Behling v. Seattle Electric Co.*..... 150
3. CARRIERS—NEGLIGENCE—SETTING DOWN PASSENGERS. Whether a street railway company is guilty of negligence in stopping its street car for a passenger to alight, on a dark night, directly over an excavation for a sewer, of which it had notice, is a question for the jury, where there was evidence that the passengers on the car saw the hole, although the motorman testified that it was so dark he could not see it, and stopped his car with reference to a red light that had marked the place, but which had been moved without his knowledge, and the evidence being conflicting. *Murray v. Seattle Electric Co.* 444
4. CARRIERS—PASSENGERS—TAKING WRONG CAR—TRANSFERS—TICKETS—TRESPASSERS—EJECTION—OPERATION OF STREET CARS—PERFORMANCE BY CARRIERS. Where a passenger by mistake and without fault of the company boarded a street car having placards indicating that it ran only to a point two miles short of his destination, with a ticket of a form common to several stations entitling him to ride over the line to his destination, he is not entitled to a transfer upon the car's reaching the end of its run, contrary to rules of the company; since the company is not bound to run all its cars the entire length of its line or provide transfers from one car to another; and upon refusing to leave the car at the end of its run the passenger becomes a trespasser and cannot recover for ejection. *Mills v. Seattle, Renton & Southern R. Co.*..... 20

CARRIERS—CONTINUED.

5. **SAME—TRESPASSERS—EJECTION—ASSAULT.** A street car company is liable to a passenger who had become a trespasser, if ejected while the car was in motion so as to endanger life or limb, or if wilfully assaulted with unnecessary force by the conductor. *Mills v. Seattle, Renton & Southern R. Co.*..... 20
6. **SAME—TRESPASSERS—ASSAULT—BY SERVANT—SCOPE OF EMPLOYMENT.** A street car company is not liable to a passenger who had become a trespasser, for an assault committed by one employed as a greaser, who had nothing to do with the operation of the cars, while attempting an ejection from the car, unless the greaser was assisting the conductor and used more force than was necessary; since the ejection was outside the scope of the greaser's employment. *Mills v. Seattle, Renton & Southern R. Co.*..... 20

CERTIFICATE:

- Increase of amount in benefit certificate, see **INSURANCE**, 4.
- Pledge of certificate of stock in corporations, see **PLEDGES**.
- Of delinquency issued to person paying taxes, see **TAXATION**, 7, 8.

CERTIORARI:

- Remedy by certiorari as bar to prohibition, see **PROHIBITION**.

CESSATION OF CONTROVERSY:

- As ground for dismissal of appeal, see **APPEAL AND ERROR**, 6, 7.

CHALLENGE:

- Of elector at primary election, see **ELECTIONS**, 5.
- To juror, see **JURY**.

CHARTER:

- Amendment of charter of municipal corporation, see **MUNICIPAL CORPORATIONS**, 1.
- Amendment of city charter requiring vote on ordinance granting railway franchise, see **STREET RAILROADS**, 2.

CHATTEL MORTGAGES:

1. **CHATTEL MORTGAGES—VALIDITY—ACKNOWLEDGEMENT AND AFFIDAVIT OF GOOD FAITH—BILL OF SALE.** Under Bal. Code, § 4558, a bill of sale given as security must be acknowledged and accompanied by an affidavit of good faith, or it will be void as against creditors or subsequent purchasers and incumbrancers, although valid as between the parties. *Hicks v. National Surety Co.*..... 16
2. **SAME—BONA FIDE INCUMBRANCER—PRIORITY OF LIENS.** A surety company that takes a bill of sale as security for a pre-existing debt or contingent liability upon a breached contractor's bond, is not an incumbrancer for value in good faith, and its lien is inferior to that of a prior bill of sale valid as between the parties, although not executed so as to be valid as to creditors of the vendor or subsequent incumbrancers in good faith. *Hicks v. National Surety Co.*..... 16

CHATTEL MORTGAGES—CONTINUED.

3. CHATTEL MORTGAGES—FORECLOSURE—SEIZURE BY SHERIFF—AUTHORITY—NOTICE—CONVERSION. Under Bal. Code, § 5872, providing that the notice of a chattel mortgage foreclosure shall be sufficient authority for the sheriff to take possession of the property, a sheriff is not guilty of conversion in seizing the mortgaged property under a proper notice and proceedings complying with the statute, although against the protests and objections of the mortgagors, where the mortgagors did not contest the amount due or take any steps to secure a transfer of the foreclosure to the superior court, pursuant to Bal. Code, § 5876. *Mack v. Doak*..... 119
4. SAME—PARTIES LIABLE—PERSONAL JUDGMENT. In an action to foreclose a mortgage securing a contract, against a party to the contract and one claiming an interest in the property, a joint personal judgment cannot be entered against both defendants. *Hopkins v. Crane*..... 636
5. CHATTEL MORTGAGES—FORECLOSURE—ACTIONS—JURISDICTION—DETERMINATION OF AMOUNT. In an action to foreclose a mortgage given to secure the plaintiff against loss by breach of a contract, it is not necessary that damages from the breach be ascertained before suit brought, jurisdiction to foreclose necessarily including the determination of the amount for which foreclosure be awarded. *Hopkins v. Crane* 636

CHECKS:

Agreement to accept checks as cash, see BANKS AND BANKING, 3.

CHILD:

See GUARDIAN AND WARD.

CIGARETTES:

Sufficiency of title of act to regulate and prohibit sale of, see STATUTES, 3.

CITIES:

See MUNICIPAL CORPORATIONS.

CLAIM AND DELIVERY:

See REPLEVIN.

CLAIMS:

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS.
 Against city for wrongful diversion of special assessment fund, see MUNICIPAL CORPORATIONS, 17.
 Against municipal corporation for injury in streets, notice of, see MUNICIPAL CORPORATIONS, 18, 19.

CLOUD ON TITLE:

See QUIETING TITLE.

CODE PROVISIONS:

See PLEADING, 1.

COLLATERAL ATTACK:

On judgment, see JUDGMENT, 8, 9.

COLLATERAL SECURITY:

See PLEDGES.

COLLECTION:

Enforcement and collection of city taxes, see TAXATION, 13.

COLLISION:

Of pedestrian and team in city street, see MUNICIPAL CORPORATIONS, 12, 13.

Injuries to traveler at railway crossing, see RAILROADS.

Between street cars, or with vehicles, see STREET RAILROADS, 3-6.

COLOR OF TITLE:

Necessity to sustain adverse possession, see ADVERSE POSSESSION.

COMMENT:

Instructions as comment on evidence, see TRIAL, 4-6.

COMMERCE:

Decisions of United States courts as authority in state courts, see COURTS.

1. COMMERCE—INTERSTATE COMMERCE—SOLICITING ORDERS FOR NON-RESIDENT. The business of soliciting orders for goods by one in the employ of a nonresident of this state, to be filled by the employer and shipped by him into this state, if the orders are accepted, is interstate commerce, and is not subject to regulation by the enactment of an ordinance requiring the payment of a license fee therefor, regardless of whether there is any discrimination between residents and nonresidents. *State v. Glasby*..... 598

COMMISSION:

Agreement for broker's commission on sale of land, see FRAUDS, STATUTE OF.

COMMISSIONERS:

Duty of commissioners to provide surveyor with instruments, see COUNTIES, 1.

To make assessment for public improvements, see MUNICIPAL CORPORATIONS, 6.

COMMUNITY PROPERTY:

- Descent of on death of husband, see DESCENT AND DISTRIBUTION.
- In general, see HUSBAND AND WIFE.
- Claim against city for injuries to wife, see MUNICIPAL CORPORATIONS, 19.

COMPENSATION:

- For property taken for public use, see EMINENT DOMAIN, 3-5.

COMPETENCY:

- Of witnesses in general, see WITNESSES, 1, 2.

COMPUTATION:

- Of period of limitation, see LIMITATION OF ACTIONS.

CONDEMNATION:

- Taking property for public use, see EMINENT DOMAIN.

CONDITIONS:

- Precedent to action, see ACTION.
- Precedent to right of foreign corporation to sue, see CORPORATIONS, 3.
- Precedent to foreclosure of mortgage given to secure against loss by breach of contract, see CHATTEL MORTGAGES, 5.
- Performance or breach of conditions in insurance policy, see INSURANCE.
- Precedent to action for diversion of special assessment fund, see MUNICIPAL CORPORATIONS, 17.
- Pleading conditions upon which action is based, see PLEADING, 7.
- Specific performance of contract subject to conditions, see SPECIFIC PERFORMANCE.
- Precedent to foreclosure of tax certificate, see TAXATION, 8.
- Tender of deed in action by vendor to cancel contract of sale, see VENDOR AND PURCHASER, 7.
- Precedent to action for breach of contract to sell land, see VENDOR AND PURCHASER, 12.

CONFIRMATION:

- Of foreclosure sale, see MORTGAGES, 6.

CONSIDERATION:

- Admissibility of parol evidence to show nature of consideration, see EVIDENCE, 4.
- Value as evidence of contract price for land sold, see VENDOR AND PURCHASER, 10, 11.

CONSISTENCY:

- Of verdict with special findings, see TRIAL, 10.

CONSTITUTIONAL LAW:

Nomination of candidates under primary election laws, see **ELECTIONS**, 9, 10.

Taxation for highways, see **HIGHWAYS**, 3.

Mode of assessment for local improvement, see **MUNICIPAL CORPORATIONS**, 6, 7.

Subjects and titles of statutes, see **STATUTES**.

Effect of partial invalidity of statutes, see **STATUTES**, 1.

Exemption from taxation, see **TAXATION**, 1-4.

1. **CONSTITUTIONAL LAW—RIGHT OF CONTRACT.** An ordinance prohibiting solicitation by hack drivers in railroad stations when used by passengers entering or leaving the same is not an unreasonable restriction upon the right of private contract, especially where the passengers have opportunity on the trains and at an office in the building to fulfill their wants without solicitation. *Seattle v. Hurst* 424
2. **SAME—POLICE POWER.** Such an ordinance is not invalid as to a pre-existing contract allowing solicitation; since all contracts are subject to the police power, and any limitation of the contract would be *damnum absque injuria*. *Seattle v. Hurst*..... 424
3. **CONSTITUTIONAL LAW—COURTS—POLITICAL QUESTIONS.** That a primary election law tends to destroy political parties, which are of general utility and necessity, is a political rather than a judicial question, which cannot be urged upon the courts as affecting the constitutionality of the law. *State ex rel. Zent v. Nichols*..... 508

CONSTRUCTION:

Of statute relating to establishment of branch banks, see **BANKS AND BANKING**, 1.

Of contract giving "exclusive agency" to broker to sell land, see **BROKERS**, 1.

Of contracts, see **CONTRACTS**, 2, 3.

Of deed as to reservation and time for removal of timber, see **DEEDS**.

Of laws of benefit society relating to increase in certificate, see **INSURANCE**, 4.

Statutory provision relating to limitation of action on judgment, see **JUDGMENT**, 12.

CONTINUANCE:

Waiver of objections to denial of continuance, see **APPEAL AND ERROR**, 31.

1. **CONTINUANCE—SURPRISE—EVIDENCE.** Upon a counterclaim by defendant for a board bill it is proper to deny a continuance on the ground of surprise by reason of evidence that plaintiff had furnished money to defendants' young brother, a cousin, at their request, which fact was not pleaded in the complaint, where the same was not in-

CONTINUANCE—CONTINUED.

troduced to sustain a recovery therefor, but only to show the relations of the parties and to support plaintiff's claim that there had been no agreement to pay board during his visits to the defendant. *Hendelman v. Kahn*..... 247

CONTRACTS:

Agreement by bank to accept checks as cash and credit same to new bank, see **BANKS AND BANKING**, 3, 4.
 Construction of owner's agreement to give "exclusive agency" to sell land, see **BROKERS**, 1.
 Cancellation, see **CANCELLATION OF INSTRUMENTS**, 3.
 Liberty to contract as personal right, see **CONSTITUTIONAL LAW**, 1.
 Of counties, see **COUNTIES**, 2.
 Parol evidence to vary writing, see **EVIDENCE**, 5.
 Agreement to pay by will for services rendered, recovery against estate, see **EXECUTORS AND ADMINISTRATORS**, 2, 3.
 Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.
 Of insurance in general, see **INSURANCE**.
 Of marriage, see **MARRIAGE**.
 In violation of city ordinance prohibiting solicitation by hack drivers in depots, see **MUNICIPAL CORPORATIONS**, 14.
 Reformation of contracts, see **REFORMATION FOR INSTRUMENTS**.
 Sales of personalty, see **SALES**.
 Specific performance, see **SPECIFIC PERFORMANCE**.
 Rescission of sale of land, see **VENDOR AND PURCHASER**, 4, 5, 7.
 Sale of land, see **VENDOR AND PURCHASER**.
 Implied obligations to pay for services rendered, see **WORK AND LABOR**.

1. **CONTRACTS—VALIDITY—CONDITION LIMITING POWER TO CONTRACT.**
 The vendor in a conditional sale cannot limit his power to make other written contracts respecting the payments, by a memorandum in the bill of sale to the effect that the vendor shall not be responsible for any written or verbal contract or promise other than written or granted on the face of the contract. *Gilbert Co. v. Husted*... 61
2. **CONTRACTS—CONSTRUCTION—SUBSEQUENTLY REDUCING TO WRITING—EFFECT.** The fact that a contract for the construction of a building was not reduced to writing and signed until after the commencement of the work does not affect the writing as a controlling statement of the terms and conditions agreed upon, and the writing measures the rights of the parties. *Goss v. Northern Pacific Hospital Association* 236
3. **SAME—BUILDING CONTRACTS—STIPULATIONS—REMEDY PROVIDED—EXCLUSIVENESS.** Where a building contract provided for its completion by the principal contractor within a certain date, and that, for any delay or default of any other contractor, additional time should be given for the completion of the building, the provision constitutes

CONTRACTS—CONTINUED.

the principal contractor's sole remedy; and he cannot recover damages from the owner resulting by reason of the delay or default of another contractor having the plumbing work. *Goss v. Northern Pacific Hospital Association*..... 236

CONTRIBUTORY NEGLIGENCE:

Of traveler injured through defects in highway, see HIGHWAYS, 8.
Of servant, see MASTER AND SERVANT, 15-18, 21.
Of person injured by defect or obstruction in street, see MUNICIPAL CORPORATIONS, 12, 13, 15.
Of person injured at railroad crossing, see RAILROADS.
Inconsistency of verdict with special findings as to negligence of servant, see TRIAL, 10.

CONVEYANCES:

In general, see DEEDS.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
As security for debt, see MORTGAGES.
Water rights, see WATERS AND WATER COURSES.

CORPORATIONS:

See BANKS AND BANKING.
Condemnation by private corporation for public purposes, see EMINENT DOMAIN, 1, 2.
Mutual benefit insurance associations, see INSURANCE, 4.
Municipalities, see MUNICIPAL CORPORATIONS.
Pledge of corporate stock, see PLEDGES.

1. **CORPORATIONS—REPRESENTATIONS—AUTHORITY OF MANAGER—RATIFICATION.** Upon conflicting evidence of witnesses as to the authority of a managing agent of a corporation to purchase wheat and hold the same for an advance price, his authority so to do is established where it appears from bank books and other documents that he had continually been doing business in that way for two years, to the knowledge of the stockholders and officers, and that no complaint was made until it was found that a loss would be sustained through a fall in the market. *Iona Warehouse Co. v. Van Buren*..... 375
2. **CORPORATIONS — INSOLVENCY — RECEIVERS — FRAUDULENT CONVEYANCES.** A receiver is properly appointed for an insolvent corporation, at the suit of creditors, and the complaint states a cause of action, where it appears that it was, from its inception, a fraudulent scheme on the part of its promoter, that it fraudulently assumed to make sales of property to the plaintiffs without having any title, and that it was without any assets and had conveyed to its promoter and chief stockholder all its property with intent to defraud its creditors. *Kelso v. American Investment & Improvement Co.*..... 381

CORPORATIONS—CONTINUED.

3. CORPORATIONS—ACTIONS—BY FOREIGN CORPORATION—LICENSE FEES—DOING BUSINESS. Bal. Code, § 5149, providing that no corporation shall commence any action in this state without alleging and proving that it has paid its annual license fee, refers only to corporations doing business in this state, and does not apply to a nonresident corporation simply bringing an action in this state, as that does not constitute doing business here. *Lilly-Brackett Co. v. Sonnemann*. 487

CORRECTION:

- Of record on appeal or writ of error, see APPEAL AND ERROR, 26.
 Of judgment, see JUDGMENT, 3-5.
 Of assessment of taxes, see TAXATION, 6.

COSTS:

- Necessity of including costs in tender of amount due as constituting cessation of controversy, see APPEAL AND ERROR, 7.
 On correction of record to cure mistake of clerk, see APPEAL AND ERROR, 26.
 On enforcement of lien on logs, see LOGS AND LOGGING, 3.
1. COSTS—PERSONS ENTITLED—INTERVENERS. Persons improperly intervening are not entitled to costs from the insolvent's estate. *Springer v. Ayer*..... 642
 2. COSTS—PARTIES ENTITLED. Where a trustee in bankruptcy claims property in the hands of a receiver appointed by the state court, and is denied the relief asked, it is error to award the trustee costs as against the insolvent's estate. *Springer v. Ayer*..... 642
 3. COSTS—COPIES OF RECORDS—TRIAL ON AGREED FACTS. Costs may be allowed for certified copies of deeds and records necessarily prepared before the trial, although subsequently the case was submitted on an agreed statement of facts. *Hamilton v. Witner*..... 689
 4. COSTS—REMEDIES FOR COLLECTION—ACTIONS—ABATEMENT—FORMER ACTION FOR COSTS—STAY OF PROCEEDINGS—ABUSE OF DISCRETION. Where a widow brought suit against a county in her own name for the wrongful death of her husband, and upon submitting to a voluntary nonsuit, judgment for \$264 costs was entered against her, it is an abuse of discretion, upon the commencement of a suit by her as administratrix for the benefit of the widow and children, to stay proceedings as to the widow's claim until the costs of the former action were paid, where it appears that she is without means, has three small children to support, that she and the children had been ill, dependent upon charity, and inmates of the county poor farm, and no additional costs would accrue to the county by reason of the inclusion of the widow's claim. *Archibald v. Lincoln County*.... 55

COUNCIL:

See MUNICIPAL CORPORATIONS, 2.

Power of city council to grant railway franchise, see STREET RAILROADS, 1, 2.

COUNTERCLAIM:

See SET-OFF AND COUNTERCLAIM.

COUNTIES:

Condemnation of land for county road, see EMINENT DOMAIN, 4-10.

Injuries from defects in highway, see HIGHWAYS, 6-8.

1. COUNTIES—COMMISSIONERS—DUTY TO PROVIDE SURVEYOR WITH INSTRUMENTS—MANDAMUS—WHEN LIES. Under Bal. Code, § 499, providing that the county surveyor shall be furnished with "all necessary cases and other suitable articles," and Bal. Code, § 342, giving the county commissioners general charge of county property and business, mandamus will lie to compel the county commissioners to provide the county surveyor with a transit, where it is admitted that it is necessary to the proper discharge of his official duties, as it is duty enjoined by law as to which there is no discretion; and the fact that the surveyor procured an instrument of his own, and presented a bill therefor, which was disallowed, is no defense. *State ex rel. Manning v. Major*..... 355
2. COUNTIES—CONTRACTS—BIDS—AUTHORITY OF COMMISSIONERS AS TO ROAD WORK. Bal. Code, § 3767, providing that county commissioners must open and work necessary county roads, and "in their discretion let out by contract to the lowest bidder, the construction or improvement . . . when the expenses . . . will exceed fifty dollars," reposes a discretion with the commissioners to contract therefor with or without bids; and a contract exceeding fifty dollars is valid without being let to bids. *Giffin v. King County*..... 327

COURTS:

Review of decisions, see APPEAL AND ERROR, 1-3.

State courts and courts of bankruptcy, see BANKRUPTCY.

Jurisdiction to revise acts of benefit society, see BENEFICIAL ASSOCIATIONS, 2.

Political questions, see CONSTITUTIONAL LAW, 3.

Appointment of receiver for insolvent corporation, see CORPORATIONS, 2.

Foreign divorces, property not disposed of by decree, see DIVORCE, 1, 3.

Authority to amend or correct judgment in same court, see JUDGMENT, 3-5.

Conclusiveness of judgments, see JUDGMENT, 10.

Annulment of marriage, see MARRIAGE, 3, 4.

COURTS—CONTINUED.

Prohibiting judicial proceedings, see PROHIBITION.

Jurisdiction to appoint receiver to apply funds of state dental board in satisfaction of judgment against board, see STATES, 6.

Comment of judge on evidence, see TRIAL, 4-6.

1. COURTS—RULE OF DECISIONS—FEDERAL QUESTION. Questions involving interstate commerce must be controlled by the decisions of the United States supreme court. *State v. Glasby*..... 598

COVENANTS:

Against assignment of leased premises, see LANDLORD AND TENANT.

CREDIBILITY:

Of witness, see WITNESSES, 4.

CREDITORS:

Right to intervene in action against receiver, see RECEIVERS.

CREDITORS' SUIT:

Against insolvent corporations, see CORPORATIONS, 2.

CREDITS:

Exemption from taxation, see TAXATION, 1-4.

CRIMINAL LAW:

See EXTORTION; OBSTRUCTING JUSTICE.

Prosecutions by state dental board, see STATES.

Trial of civil actions, see TRIAL.

1. CRIMINAL LAW—VENUE—EVIDENCE. The venue of a forgery is sufficiently established, although no witness testified directly that the crime was committed at a designated place, where there were many inferences from the testimony and a great deal of direct proof that it was committed in a certain county. *State v. Gilluly*..... 1
2. CRIMINAL LAW—PROSECUTIONS—PRIVATE COUNSEL. Where private counsel of the state dental board assisted in prosecutions instituted by the board, it will be presumed that the prosecuting attorney consented thereto as required by Bal. Code, § 3031. *Stern v. State Board of Dental Examiners*..... 100
3. CRIMINAL LAW—TRIAL—DIRECTING STATEMENT OF DEFENSE. Under Bal. Code, § 4993, the accused has no option to refuse to state his defense upon the close of the plaintiff's case. *State v. King*.... 312
4. CRIMINAL LAW—SENTENCE—CHANGE OF LAW. Where the crime of forgery was committed on April 11, 1907, the accused cannot be sentenced under the law approved March 13, 1907, p. 341, which went into effect June 11, 1907; since § 8 provides that a person found guilty of a crime committed prior to the taking effect of the law shall be sentenced under the law in force at the time of the offense. *State v. Gilluly*..... 1

CRIMINAL LAW—CONTINUED.

5. **SAME—PROVINCE OF COURT AND JURY—INSTRUCTIONS—CREDIBILITY OF WITNESS.** It is prejudicial error, in giving an instruction as to an alibi, to preface the same by a remark that the court did not think it necessary, where the credibility of the accused on that point was directly in issue; as the same disparages the defense and infringes upon the province of the jury. *State v. King*..... 312
6. **SAME—MISLEADING INSTRUCTIONS—ALIBI—MATERIALITY OF TIME.** Where the state's evidence fixed the date of an offense as being between the 12th and 15th of a certain month, and upon the defense of an alibi there was evidence that the defendant was home, sick in bed, during that period, it is misleading and error, instructing upon the subject of the alibi, to state that the exact date is immaterial and it is sufficient if the defendant committed the crime at any time within three years, etc. *State v. King*..... 312
7. **SAME—APPEAL—DECISION—IMPROPER SENTENCE—NEW TRIAL.** A new trial will not be ordered, where the sentence is improper, but the case will be remanded for a proper sentence. *State v. King*.. 312
8. **CRIMINAL LAW—APPEAL—REVIEW—VERDICT.** A verdict in a criminal case cannot be set aside because of the vague, inconsistent and contradictory statements of the principal witness for the state, where there was sufficient evidence, if uncontradicted or if believed by the jury, to sustain it. *State v. Gilluly*..... 1
9. **SAME—APPEAL—DECISION—SENTENCE—REMAND.** Upon reversing a criminal conviction because of an improper sentence, the case will be remanded for the imposition of a proper one. *State v. Gilluly*. 1

CROSS-EXAMINATION:

- Of witness to show interest and ultimate liability of contractor for injuries to pedestrian, see **MUNICIPAL CORPORATIONS**, 16.
- Of witness, see **WITNESSES**, 4.

CROSSINGS:

- Accidents at railroad crossings, see **RAILROADS**.

CURATIVE ACTS:

- Relating to public improvements in cities, see **MUNICIPAL CORPORATIONS**, 4.

CUSTOMS AND USAGES:

- As affecting authority of officers to make loans, see **BANKS AND BANKING**, 4.

DAMAGES:

- Breach by owner of contract to give "exclusive agency" to sell land, see **BROKERS**, 1.
- Ascertainment from breach of contract as condition precedent to foreclosure, see **CHATTEL MORTGAGES**, 5.

DAMAGES—CONTINUED.

Right of principal contractor for delay of contractor on other work, see **CONTRACTS**, 3.

In actions for wrongful death, see **DEATH**.

Condemnation of property taken for public use, see **EMINENT DOMAIN**, 3-5, 11.

For fraud, see **FRAUD**.

Evidence of damages for obstruction of highway, see **HIGHWAYS**, 5.

Measure of damages for fraud in sale of partnership property, see **PARTNERSHIP**.

Breach by vendor of contract for sale of land, see **VENDOR AND PURCHASER**, 12, 13.

Injuries to property by negligent maintenance of water pipe line, see **WATERS AND WATER COURSES**, 3.

1. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A judgment for personal injuries will not be held excessive on appeal, where two different juries and the court had approved the amount and were in a much better position than the supreme court to judge of the nature and extent of the injuries. *Matthews v. Spokane*..... 107
2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$26,985, for personal injuries, reduced to \$20,000 by the trial court, is not excessive, where it appears that the plaintiff, a section man, forty-three years of age, in good health, earning \$2.25 per day, was run over by a hand car, dislocating his vertebra, that he is paralyzed from his hips down, has completely lost the control of his bowels, urinary and other organs, and is completely helpless and will be confined to his bed for the remainder of his life, and suffers constantly. *Tills v. Great Northern R. Co.*..... 536
3. **DAMAGES—EXCESSIVE VERDICT—LOSS OF FINGER.** A verdict for \$1,500 for the loss of a little finger, resulting in confinement in a hospital for but two hours, is excessive and should be reduced to \$1,000. *Olsen v. Tacoma Smelting Co.*..... 128

DANGEROUS MACHINERY:

See **MASTER AND SERVANT**, 1, 2, 4, 7, 10-12.

DEATH:

1. **DEATH—ACTION FOR—PARTIES ENTITLED TO SUE—PLEADING.** An action for wrongful death may be prosecuted in the name of the administratrix of the deceased's estate, although it is not alleged that it is for the benefit of the widow and children, where they are named in the complaint; as the action will inure to their benefit by operation of law. *Archibald v. Lincoln County*..... 55
2. **DEATH—BY WRONGFUL ACT—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY.** There is no sufficient evidence of the proximate cause of the death of plaintiff's decedent to warrant submitting the case to the jury, and a nonsuit is properly granted, where it appears that

DEATH—CONTINUED.

the deceased, a sawyer in a mill, was killed while all the other men were on the floor above changing the saws; that while there might be room for an inference that his head came in contact with a nearby unguarded Rosser saw, which was left in motion, there were no witnesses to the accident and no testimony to show in what manner he came in contact with the saw, whether in the line of his duty or performance of his work, or in some of the many ways for which the master would not be liable. *Whitehouse v. Bryant Lumber & Shingle Mill Co.*..... 563

3. **DEATH—DAMAGES — EVIDENCE — SUFFICIENCY.** In an action for wrongful death, prosecuted for the benefit of deceased's widow and children, evidence of the age of deceased, his life expectancy, and his earning capacity, is sufficient to enable the jury to assess the damages. *Archibald v. Lincoln County.*..... 55

DECEDENTS:

Testimony as to transactions with persons since deceased, see **WITNESSES**, 1, 2.

DECISION:

On appeal, see **APPEAL AND ERROR**, 52-55.

DECLARATIONS:

As evidence in civil actions, see **EVIDENCE**, 2.

DEEDS:

Sufficiency of deed as color of title, see **ADVERSE POSSESSION**, 1, 3.

Cancellation, see **CANCELLATION OF INSTRUMENTS**, 1, 4.

Parol evidence as to nature of consideration, see **EVIDENCE**, 4.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**.

Tax deeds, see **TAXATION**, 13.

Water rights, see **WATERS AND WATER COURSES**.

1. **DEEDS—RESERVATION OF STANDING TIMBER—TIME FOR REMOVAL—CONSTRUCTION.** Upon the sale of land reserving to the grantor the standing timber, under a clause requiring its removal within two years, the timber reverts to the owner of the land if it is not removed within the time fixed; as the clearly expressed intention is that it be removed with that time. *Lehtonen v. Marysville Water and Power Co.*..... 359

DEFENSES:

In action for cancellation of instrument for fraud, see **CANCELLATION OF INSTRUMENTS**, 2.

Necessity for accused to state defense upon close of plaintiff's case, see **CRIMINAL LAW**, 3.

DELAY:

Of other contractor, remedy of principal contractor under stipulations of contract, see **CONTRACTS**, 3.

Time for filing information, see **INDICTMENT AND INFORMATION**.

DEMAND:

As condition precedent to action, see **ACTION**.

DEMURRER:

To pleading, see **PLEADING**, 3.

DENTAL BOARD:

Authority to employ private counsel, see **STATES**, 1.

DEPOSITS:

Recovery of by holder of certificate of deposit, see **BANKS AND BANKING**, 2.

DESCENT AND DISTRIBUTION:

Rights of heirs in community property, see **HUSBAND AND WIFE**.

1. **DESCENT AND DISTRIBUTION — HUSBAND AND WIFE — COMMUNITY PROPERTY.** Upon the death of a husband his community real property descends one-half to the wife and one-half, share and share alike, to his children, who become tenants in common. *Schlarb v. Castaing* 331

DISCHARGE:

Of guardian upon appearance of ward who has attained majority, see **GUARDIAN AND WARD**.

DISCRETION OF COURT:

Review of discretionary action, see **APPEAL AND ERROR**, 33-37.

Stay of action for non-payment of costs, see **COSTS**, 4.

DISCRIMINATION:

As against nonresidents engaged in interstate commerce, see **COMMERCE**.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see **APPEAL AND ERROR**, 4, 6, 7, 15, 16, 17, 23.

Harmless error in granting nonsuit, see **APPEAL AND ERROR**, 42.

Granting of nonsuit on appeal, see **APPEAL AND ERROR**, 53.

For nonpayment of costs of continuance, see **COSTS**, 4.

Dismissal of prosecution for delay in filing information, see **INDICTMENT AND INFORMATION**.

DISSOLUTION:

Of garnishment, see **GARNISHMENT**.

Of marriage, see **MARRIAGE**, 3, 4.

DISTRIBUTION:

Of excess in special improvement fund, see MUNICIPAL CORPORATIONS, 8, 9.

DISTRICT AND PROSECUTING ATTORNEYS:

Appointment of counsel to represent, see CRIMINAL LAW, 2.

DIVERSION:

Of special assessment fund, liability of city, see MUNICIPAL CORPORATIONS, 17.

Of water course, see WATERS AND WATER COURSES, 1, 2.

DIVORCE:

Annulment of marriage, see MARRIAGE, 3, 4.

Variance in pleadings, see PLEADING, 5.

1. **DIVORCE—JURISDICTION OF COURT—DOMICILE—JUDGMENTS—OF SISTER STATE—CREDIT TO BE ACCORDED—COMITY.** Where, upon service of summons by publication, a divorce is secured in a sister state, which was the domicile of the marital relation and the actual *bona fide* home of the plaintiff, the decree is entitled to recognition in every other state, under the full faith and credit clause of the constitution, or at least will be accorded credit in this state as a matter of comity. *Buckley v. Buckley*..... 213
2. **DIVORCE—DIVISION OF PROPERTY.** Upon awarding a divorce to a husband on the ground of abandonment, the husband is liberally provided for in the division of the property, having regard to the respective merits of the parties, their condition, and the party through whom the property was acquired, as required by Bal. Code, § 5723, where it appears that at the time of their marriage, he was a young man in good health, able to work and worth \$2,000, while the wife was considerably older and possessed of an estate worth \$70,000; that she provided all his living expenses for five years, while he did nothing but look after investments, and the parties having separated, the husband was awarded an estate valued at \$23,000 and the wife an estate valued at \$92,000. *Kolbe v. Kolbe*. 298
3. **DIVORCE—DISPOSITION OF PROPERTY—OF PARTIES DIVORCED BY FOREIGN DECREE.** Where the courts of a sister state grant a divorce to a wife domiciled there without disposing of the property of the husband situated in this state, where the husband resides, the courts of this state may thereafter, in any appropriate action, divide the property as authorized by Bal. Code, § 5723, in the case of a divorce granted here; and the wife cannot claim an absolute right to one-half thereof as between tenants in common. *Buckley v. Buckley* 213

DOMICILE:

For purposes of divorce, see DIVORCE, 1.

DUES:

Forfeiture of insurance policy for nonpayment, see INSURANCE, 2.

EJECTION:

Of passengers, see **CARRIERS**, 4-6.

EJECTMENT:

Appealability of judgment for cost on dismissal of action as dependent on amount in controversy, see **APPEAL AND ERROR**, 1.

ELECTIONS:

Primary election law, political questions, see **CONSTITUTIONAL LAW**, 3.

1. **ELECTIONS—NOMINATIONS—PRIMARY ELECTION—FILING STATEMENT OF EXPENSES—TIME FOR—INDEFINITENESS.** Where a primary election law is indefinite as to the time within which candidates shall file a list of their expenditures, they must file the same within a reasonable time. *State ex rel. Zent v. Nichols*..... 508
2. **ELECTIONS—CONGRESSIONAL NOMINATIONS—STATE LEGISLATURE.** The nomination of candidates for the house of representatives in Congress is a matter for state regulation. *State ex rel. Zent v. Nichols* 508
3. **ELECTIONS—PRIMARY NOMINATIONS—REQUIREMENT OF FEE FROM CANDIDATES—VALIDITY.** The provisions in the primary election law requiring candidates for public office to pay a fee for the privilege of running for office is valid, as those seeking the benefit of a proceeding may be required to reimburse the state in carrying the same into effect. *State ex rel. Zent v. Nichols*..... 508
4. **ELECTIONS—NOMINATIONS—PRIMARY ELECTIONS—QUALIFICATIONS OF ELECTORS.** The constitutional qualifications for electors at a general election have no application to primary elections for the nomination of candidates for public office. *State ex rel. Zent v. Nichols* 508
5. **SAME—CHALLENGE OF ELECTOR—OATH.** The provision of the primary election law, requiring any elector who may be challenged to make oath or affirmation that he intends to affiliate with the party whose ballot he demands, is a reasonable provision to protect the integrity of political parties, and constitutional. *State ex rel. Zent v. Nichols* 508
6. **ELECTIONS—NOMINATIONS—PRIMARY ELECTIONS—DECLARATION OF CANDIDACY—VACANCIES—FAILURE TO SPECIFY TERM.** Under the primary election law, Laws 1907, p. 457, § 2, providing that the act shall not apply to special elections for filling vacancies, and § 38 providing that where there is a vacancy in the office of judge, candidates may announce themselves for either the long or short term, a declaration of candidacy for the office of judge in a district in which there was a vacancy which does not specify any term, must be held to be a candidacy for the regular or long term only. *State ex rel. Zent v. Nichols* 508

ELECTIONS—CONTINUED.

7. SAME—EXCLUSIVENESS OF NOMINATIONS—JUDGES—STATE OFFICERS. The primary election law, Laws 1907, p. 476, § 38, providing that the judges of the supreme and superior courts shall be considered state officers within the meaning of the act, which act provides for the nomination of candidates for all state elective offices, supersedes all other forms of nomination, and a candidate for judge of the superior court nominated by a petition or certificate of electors under Bal. Code, §§ 1350 and 1352, is not entitled to have his name appear on the official ballot. *State ex rel. Zent v. Nichols*..... 508
8. SAME. The legislature may provide that only the names of candidates nominated at the primary election in the manner specified shall appear on the official ballot, since the electors have the privilege of writing or pasting thereon the name of any candidate for whom they desire to vote. *State ex rel. Zent v. Nichols*..... 508
9. SAME—REQUISITE PERCENTAGE OF VOTES CAST—PERSONS ENTITLED—SECOND CHOICE VOTES. Where there are four candidates for an office, a candidate receiving less than forty per. centum of the first choice votes cannot claim to be the nominee at a primary election, when the law expressly declares that such a candidate shall not be a nominee; and he therefore is not in a position to complain of the unconstitutionality of a provision relating to second choice votes. *State ex rel. Zent v. Nichols*..... 508
10. SAME—FIRST AND SECOND CHOICE VOTES—REASONABLENESS OF PROVISIONS. The legislature has power to provide that where there are four candidates for an office, a candidate receiving less than forty per centum of his party vote shall not be deemed its nominee, and that in such case the candidate receiving the highest number of first and second choice votes shall be the nominee; since there is no interference with the freedom of the elector in casting his first choice ballot, and the provision is a reasonable method of determining the nominees in case there is no party nomination by first choice votes alone. *State ex rel. Zent v. Nichols*..... 508
11. ELECTIONS—NOMINATIONS—PRIMARY ELECTION—FEES—REASONABLENESS. It is not unreasonable or in excess of legislative power to exact a fee of \$60 from a nominee for the office of governor, under the primary election law, based upon a percentage of the annual salary of \$6,000, for the privilege of having the candidate's name printed on the official ballot. *State ex rel. Boomer v. Nichols*.... 529

ELECTORS:

Qualifications of at primary election, see ELECTIONS, 4.

ELECTRICITY:

1. ELECTRICITY—ACTIONS FOR INJURIES—SHOCK—EVIDENCE—SUFFICIENCY. There is sufficient evidence that a street car company's trolley wire carried an electric current, and that it was the source of a shock to the plaintiff, where it appears that the company was

ELECTRICITY—CONTINUED.

operating street cars in the city by electricity conveyed to the cars by trolley, that wires without insulation connected the trolley with a lamp wire handled by the plaintiff at a certain street corner, and that plaintiff received an electric shock while handling the lamp wire, shortly after a trolley car had passed that point, although there was conjectural evidence that the shock may have come from some other source. *Garretson v. Tacoma R. & Power Co.*..... 24

2. **ELECTRICITY—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** A street car company is liable to a city employee, a lamp trimmer, for injuries caused by the fact that its guy wire had been negligently changed by city employees from the company's pole to a city pole, making the trimmer's work dangerous, where, after such change, the company took down the wire and replaced it in the same situation without proper insulation. *Garretson v. Tacoma R. & Power Co.*..... 24

ELOIGNMENT:

Of logs, see LOGS AND LOGGING.

EMINENT DOMAIN:

1. **EMINENT DOMAIN—PARTIES ENTITLED — PUBLIC PURPOSES — POWER FOR COMMERCIAL USES.** Laws 1907, p. 349, authorizing public service corporations to condemn property for commercial purposes, as a mere incident to their business as public service corporations, does not authorize a condemnation by a private corporation for the purposes of generating power for commercial purposes. *State ex rel. Tolt Power & Transportation Co. v. Superior Court*..... 13
2. **SAME—PRIVATE CORPORATIONS—OFFER TO SERVE PUBLIC.** A corporation engaged in a business essentially private, viz., the establishment of a power plant for generating power to be sold for a profit, cannot by an offer to serve the public and submit to legislative control, convert itself into a public service corporation so as to acquire the right of eminent domain conferred on public service corporations by Laws 1907, p. 349. *State ex rel. Tolt Power & Transportation Co. v. Superior Court*..... 13
3. **EMINENT DOMAIN—DAMAGE TO ABUTTING PROPERTY.** The right of ingress or egress as to lots abutting on a street is property, and interference therewith by building a railroad in the street is damage, within the meaning of the constitution requiring that compensation be first made before taking or damaging property. *Lund v. Idaho & Washington Northern R.*..... 574
4. **SAME—COMPENSATION—SET-OFF—BENEFITS TO LANDS NOT TAKEN.** The constitutional requirement (art. 1, § 16) that property taken or damaged be paid for irrespective of benefits conferred on the land not taken, does not apply to condemnations for the purposes of a county road. *King County v. Melker*..... 29

EMINENT DOMAIN—CONTINUED.

5. SAME—ASSESSMENT OF DAMAGES — VERDICT — NOMINAL DAMAGES. In a condemnation proceeding an award of nominal damages is a sufficient verdict. *King County v. Melker*..... 29
6. EMINENT DOMAIN — PROCEEDINGS—NOTICE—SERVICE OF PETITION—COUNTY ROAD. Under Bal. Code, § 5638, requiring that the notice in condemnation for a county road shall state when the petition will be heard and contain a brief recital of the objects of the petition, it is not necessary to serve a copy of the petition with the notice. *King County v. Melker*..... 29
7. SAME—NOTICE—SUFFICIENCY. A notice in condemnation for a county road under Bal. Code, § 5638, need not contain the name of the proposed road, nor a description of property remaining to the owners after condemnation, nor reference to compensation to be awarded; but is sufficient where it complies with the statute. *King County v. Melker*..... 29
8. SAME—TIME FOR FILING PETITION. The time of filing a petition for the condemnation of a county road is not jurisdictional, the statute not providing when it shall be filed, and it is sufficient if filed on the return day. *King County v. Melker*..... 29
9. SAME—HEARING — CONTINUANCE — FAILURE TO ORDER — NOTICE OF HEARING. A failure to hear a condemnation proceeding on the return day, and adjourning without continuance to a day certain, does not work a discontinuance of the proceedings, but the same can be brought on for hearing by notice as provided for an ordinary civil action. *King County v. Melker*..... 29
10. SAME—ADJUDICATION OF PUBLIC USE—NECESSITY. If an order is necessary adjudging a public use for the condemnation of a county road, failure to enter it prior to setting the cause for hearing on the question of damages would be but an irregularity without prejudice. *King County v. Melker*..... 29
11. EMINENT DOMAIN—DECREE—AWARD OF DAMAGES—ABANDONMENT OF PROCEEDINGS—EFFECT—BAR—ESTOPPEL. Where proceedings to condemn a street across railroad rights of way and tracks resulted in an award of \$12,000 in favor of the defendants, and the city elected to abandon the proceeding and repealed the ordinance therefor, the judgment is a bar to a subsequent proceeding brought shortly after to condemn a street across the rights of way six inches south of the former location, where the same was brought for the purpose of evading the prior award, and in the hope of getting a lower verdict. *Northern Pac. R. Co. v. Georgetown*..... 580
12. EMINENT DOMAIN—PROCEEDINGS—APPEAL—TIME FOR TAKING. An appeal from an order setting aside a verdict and judgment and dismissing condemnation proceedings, on motion of the plaintiff, is governed by Laws 1907, p. 338, providing that all appeals in condemnation proceedings shall be taken within thirty days from the

EMINENT DOMAIN—CONTINUED.

date of the rendition of the judgment appealed from; and the general act allowing appeals from orders vacating a judgment within ninety days has no application. *Tacoma v. Birmingham Co.*..... 683

13. **SAME—ORDER OF DEFAULT—APPEAL—HARMLESS ERROR.** An order of default against owners appearing specially to object to condemnation proceedings for a county road is without prejudice where they were permitted to appear and be heard on the question of damages. *King County v. Melker*..... 29

14. **SAME—REMEDY OF OWNER—INJUNCTION—CONDITIONS ON GRANTING.** Upon granting an injunction to restrain the operation of a railroad until damages to abutting property be first paid, the injunction should be held in abeyance for thirty days to allow condemnation proceedings to be commenced. *Lund v. Idaho & Washington Northern R.* 574

EMPLOYEES:

See MASTER AND SERVANT.

EMPLOYMENT:

Of agent, see PRINCIPAL AND AGENT.

ENFORCEMENT:

Of judgment against state dental board, see STATES, 4, 5.

EQUITY:

See CANCELLATION OF INSTRUMENTS; REFORMATION OF INSTRUMENTS;
SPECIFIC PERFORMANCE.

Equitable estoppel, see ESTOPPEL.

Determination of adverse claims to real property, see QUIETING TITLE.

ESTATES:

Decedents' estates, see DESCENT AND DISTRIBUTION.

ESTOPPEL:

Right to raise question for first time on appeal, see APPEAL AND ERROR, 8-12, 14.

Of bank to assert defense in action to recover deposits, see BANKS AND BANKING, 2.

To deny authority of officers of banks, see BANKS AND BANKING, 3, 4.

Of city to condemn street after abandonment of prior proceedings, see EMINENT DOMAIN, 11.

To deny marriage, see MARRIAGE, 2.

To prosecute action for purchase price of lands, see VENDOR AND PURCHASER, 8.

Of vendors to demand strict performance of option agreement, see VENDOR AND PURCHASER, 3.

ESTOPPEL—CONTINUED.

1. **ESTOPPEL—TO ASSERT TITLE—LACHES—HUSBAND AND WIFE—COMMUNITY PROPERTY.** A wife is estopped from asserting a community property interest in land for which her husband held a contract of purchase from a railway company, where, in 1897, the husband sold and assigned the contract to a third person who took possession and made valuable improvements, and it appears that the wife knew of the assignment and was satisfied with the money received therefrom, they being unable to complete the payments, and in subsequent divorce proceedings against her husband, she set forth a description of property owned by him without mention of this land, and made no claim thereto at that time or for many years thereafter while the purchaser was making improvements and paying for the property, nor until the railroad company issued a deed therefor to the purchaser. *Schillreff v. Schillreff*..... 435
2. **ESTOPPEL—LACHES — ACQUIESCENCE IN PROCEEDINGS — FINDINGS — CONSTRUCTION—SUFFICIENCY.** Findings of fact, not excepted to, sufficiently show that a creditor of an estate was guilty of laches and is precluded from asserting fraud on the part of the administrator in disposing of property of which he was trustee of an express trust, where the findings recite that the sale by the administrator was made in good faith, and that the creditor had knowledge of facts that would lead a reasonably prudent man to the discovery of the fraud, if there was any, and did not use ordinary diligence, but acquiesced in probate proceedings and slept on his rights for an unreasonable time; as findings are to be liberally construed and objection to them as conclusions should be raised below by taking exceptions. *Lauridsen v. Lewis*..... 605

EVIDENCE:

- Hostile character of possession, see **ADVERSE POSSESSION**, 2.
- Review of rulings as dependent on exception in lower court, see **APPEAL AND ERROR**, 12.
- Necessity for incorporating evidence in statement to review findings, see **APPEAL AND ERROR**, 25.
- Review of ruling as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 43, 45-51.
- Of payment of note, see **BILLS AND NOTES**, 2.
- In suit for cancellation of instrument, see **CANCELLATION OF INSTRUMENTS**, 3, 4.
- For injuries to passenger, see **CARRIERS**, 3.
- Constituting surprise as ground for continuance, see **CONTINUANCE**.
- Costs of documentary evidence, see **COSTS**, 3.
- Review on appeal, see **CRIMINAL LAW**, 8.
- Place of commission of offense and venue, see **CRIMINAL LAW**, 1.
- In action for causing death, see **DEATH**.
- For personal injuries, see **ELECTRICITY**.
- In prosecution for extortion, see **EXTORTION**.

EVIDENCE—CONTINUED.

- Of conveyance in fraud of creditors, see FRAUDULENT CONVEYANCES.
- In action for obstruction of highway, see HIGHWAYS, 4, 5.
- Of establishment of highway by prescription, see HIGHWAYS, 1.
- Of dangerous condition of highway, see HIGHWAYS, 6.
- On insurance policies, see INSURANCE, 3.
- Recitals in judgment as competent evidence, see JUDGMENT, 11.
- Of marriage, see MARRIAGE, 1.
- In action for injuries to servant, see MASTER AND SERVANT, 2, 5, 11, 18, 19, 21.
- For injuries in streets, see MUNICIPAL CORPORATIONS, 12, 13, 15, 16.
- In actions for negligence causing injuries, see NEGLIGENCE.
- In prosecution for resisting officer, see OBSTRUCTING JUSTICE.
- Existence of agency, see PRINCIPAL AND AGENT.
- Authority of agent, see PRINCIPAL AND AGENT.
- Distribution in probate to heirs as evidence of title, see QUIETING TITLE.
- In suit to reform written instrument, see REFORMATION OF INSTRUMENTS.
- Of warranty on sale of horse, see SALES.
- For injuries by street railroads to person on or near tracks, see STREET RAILROADS, 3.
- Of payment and redemption of tax certificate, see TAXATION, 5.
- Reception at trial, see TRIAL, 1.
- Questions of fact for jury, see TRIAL, 2, 3.
- For price of land sold, see VENDOR AND PURCHASER, 10, 11.
- Of negligent maintenance of water pipe line, see WATERS AND WATER COURSES, 3.
- Admissibility of evidence as to transactions with decedent, see WITNESSES, 1, 2.
- Competency, attendance, credibility and examination of witnesses, see WITNESSES.
- In action for services, see WORK AND LABOR.

1. EVIDENCE—JUDICIAL NOTICE—GEOGRAPHICAL FACTS. The court will take judicial notice that the Snohomish river is a tributary to Puget Sound, and of the ebb and flow of the tide below the city of Snohomish. *Vail v. McGuire*..... 187
2. EVIDENCE—SELF-SERVING DECLARATIONS—RES GESTAE. In an action by an agent for salary and expenses incurred in a European trip, a report of his trip, made upon his return at the home office, at the defendant's request, reviewed and accepted at the time by the defendant, is not inadmissible because containing self-serving declarations argumentatively pointing out the necessities of certain expenditures, but may be received as an incident between the parties contemporaneous with the trip in the nature of *res gestae* of the whole transaction. *Shepard v. Minneapolis Threshing Machine Co.*.... 242

EVIDENCE—CONTINUED.

3. **EVIDENCE—HEARSAY.** Evidence of a statement of one not a party, who had aided in securing a subscription, as to the purposes of the subscription, is inadmissible as hearsay, when not offered for the purpose of impeachment. *Warwick v. Hitchings*..... 140
4. **EVIDENCE—CONTRACT—PAROL EVIDENCE—CONSIDERATION FOR DEED.** Where, in an action for the purchase price of land sold and conveyed, it appeared that the plaintiffs had executed an option on April 11, agreeing to convey the property for \$1,100, and on April 20 they agreed to convey the property for \$100, the deed not to be delivered until a mill had been erected on the property and was in running order, parol evidence is admissible to show that a deed executed and delivered on April 26th, and reciting a consideration of \$100, was delivered under either of such contracts, or to show the actual consideration agreed to be paid. *Warwick v. Hitchings*..... 140
5. **EVIDENCE—PAROL EVIDENCE TO VARY WRITING — CONTRACTS — AMBIGUITY.** Where a written contract provides that the vendor in a conditional sale of a piano will transfer to the vendee its moving contract until one-half of the payments are made, it is free from ambiguity, and parol evidence is inadmissible to show that the transfer was to continue for ten months, or that only the profits arising from the moving contract were to be applied on the purchase price of the piano. *Gilbert Co. v. Husted*..... 61

EXCEPTIONS:

Necessity in lower court for purpose of review, see **APPEAL AND ERROR**, 10-14.

EXCESS:

Refund of excess in special improvement fund, see **MUNICIPAL CORPORATIONS**, 8, 9.

EXCESSIVE DAMAGES:

See **DAMAGES**.

EXCESSIVE TAX:

Excessive assessments by mistake, relief from, see **TAXATION**, 6.

EXCLUSION:

Of witnesses on trial, see **TRIAL**, 1.

EXECUTION:

Bond to stay execution as affecting right to appeal, see **APPEAL AND ERROR**, 5.

Of bond on appeal, see **APPEAL AND ERROR**, 21.

Effect of reducing contract to writing after commencement of work, see **CONTRACTS**, 2.

Of tax deeds, see **TAXATION**, 13.

EXECUTION—CONTINUED.

1. EXECUTION—EXEMPTIONS—HOMESTEAD—PUBLIC LANDS. The proceeds of a Federal homestead are not exempt from execution, under a claim that the homesteader is the head of a family and intends to use the proceeds in the acquisition of a new homestead to be owned and occupied by him under the laws of the state; since Bal. Code, §§ 5219 and 5247, permitting the sale of a homestead free from liens and the acquisition of a new homestead with the proceeds applies only to the state exemptions of a certain value; the Federal exemption from pre-existing debts being but a condition of the grant, irrespective of state exemption laws or value, and not applying to proceeds of a sale. *Ritzville Hardware Co. v. Bennington*..... 111

EXECUTORS AND ADMINISTRATORS:

1. EXECUTORS AND ADMINISTRATORS—CLAIMS—EXPENSES OF LAST SICKNESS. Compensation for services of physicians, rendered to deceased during his last sickness, do not depend upon a contract with the deceased, but are given a preference right of payment over ordinary expenses of the estate, by Bal. Code, §§ 6333, 6335, 6336. *Cunningham v. Lakin*..... 394
2. EXECUTORS AND ADMINISTRATORS—CLAIMS—WORK AND LABOR—AGREEMENT TO PAY BY WILL—ACTIONS—QUANTUM MERUIT. Where services are performed for another under a contract for compensation to be made by will or otherwise upon the death of the employer, who dies without making provision therefor, an action on *quantum meruit* lies against the estate. *Pelton v. Smith*..... 459
3. SAME—INTEREST—SERVICES—AGREEMENT TO PAY BY WILL. In an action against an estate upon a *quantum meruit* for services rendered under a contract whereby the employer was to make provision therefor on his death, he having failed to do so, interest is recoverable only from the time of his death, and not from the time the employment ceased. *Pelton v. Smith*..... 459
4. EXECUTORS AND ADMINISTRATORS—PROCEEDINGS—CONCLUSIVENESS—LACHES. A creditor of an estate having a preferred claim which was on presentation disallowed for want of funds, who took no appeal or proceedings to question the administrator's sale of real estate for a nominal sum, or the administrator's discharge on final accounting, until after the lapse of more than three years and then only to interpose his claim as a counterclaim to an action on account, is concluded by the probate proceedings, and cannot reopen the same for fraud which he might have discovered with reasonable diligence. *Lauridsen v. Lewis*..... 605

EXEMPTION:

Of proceeds of sale of Federal homestead, see EXECUTION.
From taxation, see TAXATION, 1-4.

EXPENSES:

Filing of list of by candidates under primary law, see ELECTIONS, 1.

EXPULSION:

Of members of association, see BENEFICIAL ASSOCIATIONS.

EXTORTION:

1. **EXTORTION—EVIDENCE—SUFFICIENCY—CRIMINAL LAW—FAILURE OF PROOF—ARREST OF JUDGMENT.** Upon a trial and conviction of a coroner upon a charge of extortion in having exacted \$100 as a fee for services in connection with an inquest upon one McG., in violation of a statute against the exaction or extortion by an officer of "any greater fees for services than by law stated and allowed," there is a total failure of proof, and motion in arrest of judgment should have been granted, where it appears that the defendant rendered no services and was not entitled to any fees whatever for services in connection with an inquest, and there was no legal obligation on the part of the prosecuting witness to pay any fee in the matter. *State v. Wainwright* 225

FAILURE OF PROOF:

See EXTORTION.

FALSE REPRESENTATIONS:

See FRAUD.

FEES:

Payment by candidates for office under primary election law, see ELECTIONS, 3, 11.

FELLOW SERVANTS:

See MASTER AND SERVANT, 7, 9, 20.

FILING:

Notice of appeal, see APPEAL AND ERROR, 24.
 Petition in condemnation proceedings, see EMINENT DOMAIN, 8.
 Necessity to file survey and map of fishing location, see FISH.
 Criminal information or complaint, see INDICTMENT AND INFORMATION.
 Necessity to file delinquent tax certificate, see TAXATION, 8.

FINDINGS:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 9-13.
 Special findings by jury, see TRIAL, 9, 10.

FIRE INSURANCE:

See INSURANCE.

FISH:

1. **FISH—PUGET SOUND—ESTUARIES—FISHING LOCATIONS—STATUTES—APPLICATION.** Fishing locations within the ebb and flow of the tide in Snohomish river are in the waters of Puget Sound, within our statutory definitions of Puget Sound, which include all portions of tide waters emptying into the Straits of Fuca, and the bays, inlets, streams, and estuaries thereof (Bal. Code, § 7381) or emptying into the bays and estuaries thereof (Bal. Code, § 3343); an estuary being that portion of the lower course of a river subject to tides. *Vail v. McGuire* 187
2. **SAME—FISHERIES—LOCATIONS—REQUISITES—SURVEYS—RIGHTS ACQUIRED.** Laws 1905, p. 255, § 2, requires that an accurate survey and map be prepared and filed of set-net fishing locations in the waters of Puget Sound, and a locator failing to comply with the provisions of the statute is not entitled to an injunction to protect his location, as the same constitutes such property as may be held only by continued compliance with statutory regulations. *Vail v. McGuire*.. 187

FLOWAGE:

Injuries by flowage of water, see **WATERS AND WATER COURSES**, 3.

FORECLOSURE:

Of mortgage, see **CHattel MORTGAGES**, 3-5.
 Of mechanics' lien, see **MECHANICS' LIENS**.
 Of mortgage, see **MORTGAGES**.
 Of delinquent tax certificates, see **TAXATION**, 8-12.

FORMER ADJUDICATION:

See **JUDGMENT**, 10.

FRANCHISES:

For street railway, see **STREET RAILROADS**, 1, 2.

FRAUD:

As ground for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**.
 Pleading defense in suit to foreclose mortgage, see **MORTGAGES**, 2.
 In sale of partnership property, measure of damages, see **PARTNERSHIP**.
 Of agent in inducing contract of sale, see **PRINCIPAL AND AGENT**.
 In publication of summons, see **PROCESS**.

1. **FRAUD—DAMAGES.** The measure of damages for obstructing a logging road built partly on the lands of another in reliance upon fraudulent representations by defendant that he was the owner of the land, includes only that portion of the road built on the land in question, or at most, the part of the road that was rendered valueless by the obstructions. *Storseth v. Folsom*..... 456

FRAUDS, STATUTE OF:

1. **FRAUDS, STATUTE OF—REAL ESTATE—BROKER'S COMMISSIONS—TERMS OF CONTRACT.** Under Laws, 1905, p. 110, which requires an agreement authorizing or employing a broker to sell or purchase real estate for compensation or a commission to be in writing, signed by the party to be charged, etc., brokers cannot recover for commissions under a written contract giving them exclusive authority to sell real estate, where it contained no agreement for the payment of the commissions; as the same is insufficient to take the case out of the operation of the statute of frauds, and parol evidence as to an agreement for commissions is inadmissible. *Foot v. Robbins*..... 277
2. **FRAUDS, STATUTE OF—SALE OF REAL ESTATE—MEMORANDUM—SUFFICIENCY—CONTRACT FOR COMMISSIONS—BROKERS.** The words "commission to be paid when 2d payment is made to M. & M., \$625," after the signature of the vendor at the foot of a contract to purchase real estate, constitute a substantial compliance with Laws 1905, p. 110, providing that an agreement for a broker's commission on the sale of real estate shall be void unless the contract or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized. *McCrea v. Ogden*..... 495

FRAUDULENT CONVEYANCES:

See GARNISHMENT; RECEIVERS.

By insolvent corporation, see CORPORATIONS, 2.

1. **FRAUDULENT CONVEYANCES—HUSBAND TO WIFE—PRESUMPTIONS—EVIDENCE—SUFFICIENCY.** There is sufficient evidence to sustain a finding that a conveyance from a husband to a wife was fraudulent as to creditors, in view of Bal. Code, § 4580, raising such presumption and casting the burden on the wife to overcome the same by clear and satisfactory proof, where her testimony to the effect that the property was conveyed to her for the expressed consideration of \$5,000 in payment of a note of \$800 for money loaned by her to him, which money had been loaned to her sister before marriage, was contradicted by evidence tending to show admissions that she had given her money to another and lost it, and neither her sister or husband were called to testify. *Canedy v. Skinner*..... 501
2. **FRAUDULENT CONVEYANCES—SALES—CONDITIONAL SALES—SUBSEQUENT BONA FIDE PURCHASERS.** Where the vendor, in a conditional sale, delivers possession to the vendee and fails to file in the auditor's office a memorandum of the sale, as required by Laws of 1903, p. 6, the sale becomes absolute as to subsequent creditors in good faith. *Springer v. Ayer*..... 642

GARNISHMENT:

Consent to order dismissing garnishees as waiver of right to appeal, see APPEAL AND ERROR, 4.

Limitation of time to appeal from order discharging garnishee, see APPEAL AND ERROR, 19.

GARNISHMENT—CONTINUED.

1. **GARNISHMENTS—DISCHARGE—ISSUING—SUFFICIENCY.** Garnishments issued upon the ground that defendant was about to dispose of his property with intent to defraud creditors, and was guilty of a fraud in contracting the debt, are properly discharged as improperly issued, where it appears upon a showing by affidavits, that the defendant, a long-time resident of the county, was a man of means, without creditors, and able to pay plaintiff's claim, and denied that he was about to dispose of his property. *Sully v. Bushell*..... 389

GEOGRAPHICAL FACTS:

Judicial notice, see **EVIDENCE**, 1.

GOOD FAITH:

In claim of title to property, see **ADVERSE POSSESSION**, 3.

GRAND JURY:

See **INDICTMENT AND INFORMATION**.

GROUND:

For new trial, necessity of statement of in order, see **NEW TRIAL**.

GUARDIAN AND WARD:

Guardian's deed as color of title, see **ADVERSE POSSESSION**, 1.

1. **GUARDIAN AND WARD—FINAL DISCHARGE—JURISDICTION—APPEARANCE OF WARD.** Personal appearance of a ward who has attained his majority, upon the hearing of the final account of a guardian of a minor, is sufficient, without the appointment of a guardian *ad litem*, to give the court jurisdiction to order a discharge of the guardian, where the court had jurisdiction of the guardianship. *Meeker v. Mettler* 473
2. **SAME—JUDGMENT DECLARING MAJORITY—EFFECT—CONCLUSIVENESS—PARTIES BOUND.** The finding of a court having jurisdiction of the guardianship of a minor, that the ward has attained his majority is binding upon the ward and privies in estate until vacated or set aside for fraud or error; and is consequently a bar to an action by his heirs to set aside his subsequent conveyances on the ground that he was a minor. *Meeker v. Mettler*..... 473

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 42-51.

In condemnation proceedings, see **EMINENT DOMAIN**, 13.

HEARSAY:

In civil actions, see **EVIDENCE**, 3.

HEIRS:

As necessary parties to foreclosure, see **MORTGAGES**, 4.

HIGHWAYS:

Authority of commissioner to let contracts for road work with or without bids, see COUNTIES, 2.

Condemnation for, benefits to lands not taken, see EMINENT DOMAIN, 4.

Defects or obstructions in city streets, see MUNICIPAL CORPORATIONS, 12, 13, 15, 16, 18, 19.

Defects in property adjoining highway, see NEGLIGENCE.

Accidents at railroad crossings, see RAILROADS.

1. HIGHWAYS—EVIDENCE—HIGHWAY BY PRESCRIPTION. The testimony of a pioneer that a road was opened in 1852 and had been continuously traveled by the public as a public highway ever since that time without any interruption, is ample to make a case for the jury on the question of a highway by prescription, by adverse use and claim of right, and it is immaterial that the highway led up to a gate and continued no farther. *State v. Rixie*..... 676
2. SAME—PRESCRIPTIVE USE ACROSS PUBLIC LANDS. A highway may be established across public lands by adverse use. *State v. Rixie* 676
3. HIGHWAYS—ROAD TAX—STATUTES—REPEAL—GENERAL AND SPECIAL ACTS. A territorial city charter (Laws 1885-6, pp. 275-6), providing that the county shall not levy any road or road poll tax upon the property or inhabitants of the city, is impliedly repealed by the general revenue law of 1903, p. 223, which provides for a poll tax on certain persons, for the division of all territory outside of cities into road districts, and for the levy upon all taxable property in the county of a tax for a general road and bridge fund, expressly repealing all acts and parts of acts in conflict therewith; since a special law may be impliedly repealed by a general law where the intent so to do is clear. *Denton v. Walla Walla County*..... 77
4. HIGHWAYS—OBSTRUCTIONS—EVIDENCE—ADMISSIBILITY. In a prosecution for obstructing a public road, a part only of which was closed by gates, testimony as to the gates was immaterial upon an issue as to other portions of the road across which defendants felled a tree for the purpose of preventing travel thereon. *State v. Rixie*..... 676
5. HIGHWAYS—OBSTRUCTIONS—DAMAGES—EVIDENCE—SUFFICIENCY. In an action for damages for obstructing portions of certain logging roads, the measure of which was plaintiff's expense in building the portions of the roads obstructed, a nonsuit is properly ordered where the only evidence of damage was the entire cost of building the roads, and plaintiff persistently refused to give any evidence or estimate of the cost of the portions of the road in question. *Storseth v. Folsom* 456
6. HIGHWAYS—DEFECTS—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. There is sufficient evidence to show that a highway was not in a reasonably safe condition for public travel where it appears that there was a narrow grade or fill, eight or ten rods long, seven or

HIGHWAYS—CONTINUED.

eight feet wide at the top, and four or five feet high, that there was a bridge near the center of the fill, from one end of which the earth had settled away leaving an abrupt rise of six inches, and that on driving six inches or a foot from the wagon track one would be precipitated over the bluff. *Archibald v. Lincoln County*..... 55

7. SAME—DEFECTS—NOTICE TO COUNTY. Where a highway was dangerous by reason of a narrow fill, and it had been in such condition for some years, the county has both actual and constructive notice of the defect. *Archibald v. Lincoln County*..... 55
8. SAME—CONTRIBUTORY NEGLIGENCE OF TRAVELER—QUESTION FOR JURY. It is for the jury to determine whether the deceased was guilty of contributory negligence in attempting to drive home with a load of lumber on a dark night, over a narrow fill or grade only a foot or two wider than the wagon tracks, having a defective approach to a bridge, of all of which he had knowledge, where it appears that the highway had been in constant use by the public up to the day of the accident, and that deceased had no choice of routes. *Archibald v. Lincoln County*..... 55

HOMESTEAD:

Exemption of proceeds of sale, see EXECUTION.

HUSBAND AND WIFE:

Actions for wrongful death of husband or wife, see DEATH.

Descent of community property, see DESCENT AND DISTRIBUTION.

Divorce and judicial separation, see DIVORCE.

Estoppel of wife by apparent title in husband, see ESTOPPEL.

Conveyances fraudulent as to husband's creditors, see FRAUDULENT CONVEYANCES.

Marriage and annulment thereof, see MARRIAGE.

Personal judgment against, see MECHANICS' LIENS, 3.

Verification by husband of claim against city for injuries to wife, see MUNICIPAL CORPORATIONS, 19.

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—LAWFUL MARRIAGE. There can be no community property without lawful marriage; hence where a woman contracted marriage with a man knowing that he had a wife living, and they agreed to keep their property separate in view of such relation, her heirs by a former husband are not entitled to inherit from her, as community property, any property acquired by the husband. *In re Sloan's Estate*..... 86

IMPROVEMENTS:

Public improvements, see MUNICIPAL CORPORATIONS, 3-11.

INCUMBRANCERS:

Bona fide incumbrancers, see CHATTEL MORTGAGES, 2.

INDEMNITY:

1. **INDEMNITY—LIABILITY ACCRUED — LOSS SUSTAINED — PAYMENT BY NOTE.** Where the assured in a liability insurance policy gave its note for the amount of a judgment obtained for personal injuries, covered by the policy, in full satisfaction thereof, a "loss is sustained" by the assured within the meaning of a provision in the policy that no action shall be maintained thereon unless brought to reimburse the assured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. *Seattle & San Francisco R. & Nav. Co. v. Maryland Casualty Co.*..... 44

INDICTMENT AND INFORMATION:

See OBSTRUCTING JUSTICE.

1. **INDICTMENT AND INFORMATION — TIME FOR FILING — EXCUSE FOR DELAY.** The accused is not entitled to a dismissal of the charge for failure of the prosecuting attorney to file the information within thirty days, where the delay was requested by counsel authorized to represent the accused, such being a sufficient excuse, within Bal. Code, § 3276, and within the rule that the burden of showing good cause rests upon the prosecuting attorney. *State v. Fletcher*.... 303
2. **SAME—TIME FOR FILING — SESSION OF GRAND JURY.** Bal. Code, § 6802, providing that an information may be filed when the grand jury is not in session, refers to actual sessions, and does not preclude the filing of an information during the interval of a specified adjournment of the grand jury. *State v. Strange*..... 321
3. **INDICTMENT AND INFORMATION — OBJECTIONS — WAIVER BY PLEA.** Entry of a plea of not guilty waives the right to object to an information on the ground that it was filed while a grand jury was in session. *State v. Strange*..... 321

INFANTS:

See GUARDIAN AND WARD.

Infancy as interrupting limitation, see LIMITATION OF ACTIONS, 3.

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INHERITANCE:

See DESCENT AND DISTRIBUTION.

INJUNCTION:

Taking of or injury to private property, see EMINENT DOMAIN, 14.

Diversion of water, see WATER AND WATER COURSES, 1.

INSOLVENCY:

See BANKRUPTCY.

Conveyances by insolvent corporation, see CORPORATIONS, 2.

INSTRUCTIONS:

In criminal prosecutions, see CRIMINAL LAW, 5, 6.

In civil actions, see TRIAL, 4-7.

INSURANCE:

Mutual aid societies, see BENEFICIAL ASSOCIATIONS.

Liability insurance, see INDEMNITY.

1. INSURANCE—CONDITIONS—BREACH—PROCURING OTHER INSURANCE. A policy of fire insurance providing that it shall be void if the insured procures any other insurance on the property is void where the insured subsequently procures additional insurance, although innocently and in ignorance of the conditions of the policy, which he left in the hands of the agent for safe keeping and never saw. *Rice v. Hartford Insurance Co.*..... 346
2. INSURANCE—CONDITIONS—FORFEITURE—NONPAYMENT OF PREMIUM—WAIVER. A life insurance policy is rendered null and void, *ipso facto*, by failure to pay at maturity a note given in payment of the first year's premium, where the receipt therefor and the policy contained that express condition; and the company is not estopped to assert the forfeiture of the policy by the fact that it placed the note in the hands of an attorney for collection and endeavored without success to collect the note after its maturity and before the death of the assured, where the policy provided that no waiver of forfeiture should be valid unless in writing and signed by an officer of the company. *Hes v. Mutual Reserve Life Insurance Co.*..... 49
3. INSURANCE—CONDITIONS—PERFORMANCE—BREACH—EVIDENCE—BURDEN OF PROOF. A promissory warranty in an insurance policy on the part of the assured to use due diligence in maintaining an automatic sprinkler system in good working order is a condition subsequent, the performance of which need not be pleaded and proved by plaintiff; and after the policy has attached, the burden of proving a breach is upon the defendant. *Port Blakely Mill Co. v. Hartford Fire Insurance Co.* 657
4. INSURANCE—MUTUAL BENEFIT INSURANCE—LAWS OF ORDER—CONSTRUCTION—DELIVERY OF CERTIFICATE—INSURANCE WHEN EFFECTIVE. A member of a beneficial association in good standing having a benefit certificate for less than \$2,000 has a right to an increase of her certificate, as a matter of right, after passing the medical examination with approval and complying with the laws of the order, where the laws provide that such a member can be permitted to increase her certificate by making application, surrendering the old certificate, being examined by the local physician and that the new certificate shall be issued if the application is approved by the grand physician, and where the by-laws did not reserve any discretion in the officers to withhold the new certificate; hence the new insurance is effective although the member died before delivery of the new certificate therefor. *Rancipher v. Women of Woodcraft.*..... 68

INTEREST:

Direction of amount on remanding case, see **APPEAL AND ERROR**, 52.
 Recovery from estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 3.

INTERROGATORIES:

Review of discretionary ruling refusing submission to jury, see **APPEAL AND ERROR**, 33.
 To jury, see **TRIAL**, 9.

INTERSTATE COMMERCE:

See **COMMERCE**.
 Decisions of United States courts as authority in state courts, see **COURTS**.

INTERVENERS:

Parties entitled to costs, see **COSTS**, 1.

INTERVENTION:

By creditors in suit against receiver, see **RECEIVERS**.

INTOXICATING LIQUORS:

Preventing review of action of city council in revoking liquor license, see **PROHIBITION**.

1. **INTOXICATING LIQUORS — LICENSE — REVOCATION — POWER OF CITY COUNCIL—REVIEW BY COURTS—PROHIBITION.** Under Bal. Code, § 2934, conferring upon the city council the sole and exclusive authority and power to regulate, license, or prohibit the sale of spirituous liquors, the action of the city council in revoking a license without cause and refunding the unearned portion of the license fee is conclusive and not subject to review by the courts; nor is it restricted by Bal. Code, § 2935, authorizing the forfeiture and revocation of a license for violation of its terms, construing the two statutes together. *State ex rel. Puyallup v. Superior Court*..... 650

ISSUANCE:

Of certificate of delinquency, see **TAXATION**, 7.

JOINDER:

Of parties in challenge to juror, see **JURY**.
 Of causes of action in foreclosure of mechanics' lien, see **MECHANICS' LIENS**, 3.

JUDGES:

Declaration of candidacy to fill vacancy under primary election law, failure to specify term, see **ELECTIONS**, 6.
 Mode of nomination under primary election law, see **ELECTIONS**, 7.
 Comment by judge on evidence, see **TRIAL**, 4-6.

JUDGMENT:

Review, see **APPEAL AND ERROR**.

Right to appeal from on giving stay bond, see **APPEAL AND ERROR**, 5.

Necessity of exception to, see **APPEAL AND ERROR**, 14.

Time to appeal from interlocutory and final orders, see **APPEAL AND ERROR**, 18.

Modification of judgment by appellate court, see **APPEAL AND ERROR**, 52.

Compelling entry by mandamus, see **APPEAL AND ERROR**, 55.

Entry of joint personal judgment on foreclosure of mortgage, see **CHATTEL MORTGAGES**, 4.

Decision of courts in general, see **COURTS**.

Condemnation proceedings, see **EMINENT DOMAIN**, 10.

Conclusiveness of judgment declaring majority of ward, see **GUARDIAN AND WARD**.

Foreclosure of mechanics' lien, see **MECHANICS' LIENS**, 3.

Decree of foreclosure, see **MORTGAGES**, 5.

Merger of lien in judgment foreclosing rights of pledgee, see **PLEDGES**.

Vacation of for frauds, see **PROCESS**.

Alternative judgment, see **REFLEVIN**.

Right of defendant to counterclaim and money judgment in action to quiet title by cancellation of contract, see **SET-OFF AND COUNTERCLAIM**.

Enforcement against state dental board, see **STATES**, 4, 5.

Effect of irregularity in description of property in foreclosure proceedings, see **TAXATION**, 12.

1. **JUDGMENT—ON PLEADINGS—ADMISSIONS IN ANSWER.** Where affirmative defenses show that plaintiff is entitled to the relief demanded and defendants refused to plead further after demurrer to the defenses are sustained, judgment may be entered for the plaintiff without the taking of proofs upon formal denials of the answer. *Seattle Cedar Lumber Mfg. Co. v. Ballard*..... 123
2. **JUDGMENT—ON THE PLEADINGS—PLEADINGS—INCONSISTENCY OF DENIALS AND AFFIRMATIVE DEFENSES.** In an action on a bond to indemnify plaintiffs against loss on a building contract, in which the complaint alleged breach of the bond, the recovery of judgments for debt foreclosing liens on the property and plaintiffs' payment of the same, a judgment for plaintiffs on the pleadings is not warranted by an affirmative defense admitting the execution and conditions of the building contract and bond, where the answer generally denied each and all of the allegations of the complaint; since, if the answer were inconsistent in the particulars specified, the denial raised other material issues respecting the furnishing of the material and foreclosure of the liens, which would prevent judgment on the pleadings. *Helmer v. Title Guaranty & Surety Co.*..... 411

JUDGMENT—CONTINUED.

3. SAME—PROCEDURE—POWER OF COURT. Since the court has inherent power to modify a judgment entry to make it conform to the judgment actually entered, independent of any statute, it is not material under what statute the party seeks relief. *O'Bryan v. American Investment & Improvement Co.*..... 371
4. SAME — DISCRETION — APPEAL — REVIEW. The modification of a judgment entry to make it conform to the judgment actually entered is not a matter of discretion, but an imperative duty, the denial of which may be reviewed on appeal. *O'Bryan v. American Investment & Improvement Co.*..... 371
5. JUDGMENTS—ENTRY—MODIFICATION. Where it is conceded that it was the intention of the trial judge to dismiss an action without prejudice, it is error to refuse to modify a judgment which is doubtful in that respect so that its meaning will be clear. *O'Bryan v. American Investment & Improvement Co.*..... 371
6. JUDGMENT — RECITALS—SERVICE OF PROCESS—PRESUMPTION. A tax foreclosure judgment will not be set aside for failure of the summons by publication, prior to amendment thereof, to properly describe the property, where the court found and the judgment recited due service of the summons, and there was no proof that another due service had not been made on the defendant, who was a resident in an adjoining county; and the fact that a clerical error in the judgment in one place referred to the lot by the erroneous description used in the summons as first published does not affect the presumption of due service, the error in the judgment being surplusage. *Stevens v. Doohen* 145
7. JUDGMENTS—RECITALS—PROCESS—PRESUMPTIONS — DIRECT ATTACK. A recital in a judgment of due service of a summons is not conclusive where the judgment is directly attacked by an action in equity to set it aside; and an unquestioned finding that none but a defective service was made overcomes the presumption of regularity raised by the recital. *Silverstone v. Totten*..... 447
8. JUDGMENTS—COLLATERAL ATTACK. A judgment cannot be attacked by objection to the sufficiency of the complaint in the action, in a collateral proceeding brought to enforce the judgment. *Stern v. State Board of Dental Examiners*..... 100
9. JUDGMENT—COLLATERAL ATTACK. An action to set aside a decree fraudulently obtained is a direct and not a collateral attack, although further relief by way of quieting title is asked and may be given if found appropriate. *Noble v. Aune*..... 73
10. JUDGMENTS—CONCLUSIVENESS — VACATION. Judgments which had been vacated by a mutual agreement of the parties are not *res judicata* of the questions determined. *Fidelity & Deposit Co. v. Seattle, Renton & Southern R. Co.*..... 391

JUDGMENT—CONTINUED.

11. **JUDGMENTS — RECITALS — EVIDENCE — COMPETENCY.** Judgments in favor of a corporation containing recitals of want of authority of certain officers, who were not authorized to represent it, are not competent evidence of such fact, after the judgments have been vacated. *Fidelity & Deposit Co. v. Seattle, Renton & Southern R. Co.*..... 391
12. **JUDGMENTS—ACTIONS ON—LIMITATIONS—DURATION OF LIEN—STATUTES—CONSTRUCTION.** Bal. Code, § 5149, providing that no suit or proceeding shall ever be had on any judgment rendered in this state by which the lien or duration thereof shall be extended or continued in force for any greater period than six years from its date, does not prohibit actions on domestic judgments, which under Bal Code, § 4798, may be commenced within six years. *Lilly-Brackett Co. v. Sonnemann* 487

JUDICIAL NOTICE:

In civil actions, see **EVIDENCE**, 1.

JUDICIAL POWER:

See **CONSTITUTIONAL LAW**, 3.

JURISDICTION:

Amount in controversy, see **APPEAL AND ERROR**, 1-3.
 Of state courts upon appointment of trustee by Federal court, see **BANKRUPTCY**.
 Of courts to revise acts of benefit society, see **BENEFICIAL ASSOCIATIONS**, 2.
 Conditions precedent to foreclosure of mortgage, see **CHATTEL MORTGAGES**, 5.
 Particular courts, see **COURTS**.
 In divorce, see **DIVORCE**, 1.
 Discharge of guardian upon appearance of ward who has attained majority, see **GUARDIAN AND WARD**.
 Necessity of summons for jurisdictional purposes, see **PROCESS**.

JURY:

- Failure to demand jury trial as affecting review of question on appeal, see **APPEAL AND ERROR**, 8.
 Questions for jury in civil actions, see **TRIAL**, 2, 3.
 Instructions in civil actions, see **TRIAL**, 4-7.
1. **JURORS — CHALLENGE — STATUTORY PROVISIONS.** Under Bal. Code, § 4979, providing that where there are several parties on either side, they must join in a challenge to a juror, a challenge by defendants separately appearing is properly denied where one of the defendants refuses to join therein. *Colfax National Bank v. Davis*..... 92

KNOWLEDGE:

Master's knowledge of defects in tools and appliances or dangers incident to employment, see **MASTER AND SERVANT**, 4, 8, 10, 12.

LACHES:

Failure to present claim against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 4.
As ground for estoppel, see **ESTOPPEL**.

LANDLORD AND TENANT:

Lien against leasehold estate, assignee as party defendant, see **MERCHANTS' LIENS**.

1. **LANDLORD AND TENANT—LEASE—ASSIGNMENT—COVENANTS—OPTION TO SELL.** In a lease for the term of five years, containing as a part thereof an option to sell to the lessee within a specified time, a covenant not to let or underlet or assign the lease, or any part thereof, without the written consent of the lessor, applies to the option to sell; and an assignee of the option without the written consent of the lessor is not entitled to a specific performance of the option. *Behrens v. Cloudy* 400

LAW OF THE CASE:

Decision on appeal, see **APPEAL AND ERROR**, 55.

LEASES:

See **LANDLORD AND TENANT**.

LEGISLATIVE POWER:

See **MUNICIPAL CORPORATIONS**, 2.

LICENSES:

Regulation of interstate commerce, see **COMMERCE**.
Payment of license fee by foreign corporation as condition precedent to action, see **CORPORATIONS**, 3.
Sale of intoxicating liquors, see **INTOXICATING LIQUORS**.

LIENS:

Mortgage, see **CHATTEL MORTGAGES**, 2.
Judgment lien, see **JUDGMENT**, 12.
On logs, see **LOGS AND LOGGING**.
Liens of mechanics and materialmen, see **MECHANICS' LIENS**.
Effect of partial release of mortgaged premises, see **MORTGAGES**, 1.
Pledge, see **PLEDGES**.

LIMITATION:

Of amount affecting jurisdiction of courts, see **APPEAL AND ERROR**, 1-3.
Right of vendor in conditional sale to limit power of contract, see **CONTRACTS**, 1.
Of amendment of city charters, see **MUNICIPAL CORPORATIONS**, 1.

LIMITATION OF ACTIONS:

See ADVERSE POSSESSION, 1, 3.

Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 16-19.

Duration of judgment lien, see JUDGMENT, 12.

To enforce mechanics' lien, see MECHANICS' LIENS, 2.

Time to demand excess in special improvement fund, see MUNICIPAL CORPORATIONS, 9.

1. **LIMITATION OF ACTIONS—ACCOUNTS—WHEN NOT CONTINUOUS—INSTRUCTIONS.** Upon a counterclaim for a board bill, it is proper to instruct that the lapse of three years would defeat a recovery unless a payment had been made on the liability, without instructing that the statute begins to run only from the close of the account, where the periods covered a number of years and were so infrequent and far removed that they became independent transactions, precluding the idea of a continuous transaction. *Hendelman v. Kahan*.... 247
2. **LIMITATION OF ACTIONS—RECOVERY OF REAL ESTATE—ADVERSE POSSESSION—STATUTES—CONSTRUCTION—AUTHORIZED SALE—INFANTS—TENANCY IN COMMON.** Laws 1893, p. 20, § 1 (Bal. Code, § 5501), providing that actions to recover real estate of which any person may be possessed for seven years "having a connected title deductible . . . from any sheriff . . . authorized to sell such land on execution" shall be brought within seven years after possession taken, operates to bar an action by minors to recover an interest in property sold under mortgage foreclosure execution, although the minors were necessary parties to the foreclosure and were not joined and the foreclosure did not affect their interests and the purchaser was only their tenant in common, where the purchaser understood he was buying the entire property and maintained adverse possession for seven years for his own exclusive benefit; since the sale was "authorized" if directed by a judgment, whether the judgment was subject to attack or not. *Schlarb v. Castaing*..... 331
3. **SAME—PERSONS UNDER DISABILITY—INFANTS.** The legislature has power to provide that statutes of limitations shall run against minors, and such was the intent of Laws 1893, p. 20, § 1, providing a seven-year limitation for lands held under judicial sale; since by section 5, only in the case of the 3rd and 6th sections of the act are infants excepted from its operation. *Schlarb v. Castaing*..... 331

LIQUORS:

See INTOXICATING LIQUORS.

LIVERY STABLE KEEPERS:

1. **LIVERY STABLE KEEPERS—RESTRICTIONS—CONSENT OF PROPERTY OWNERS—ORDINANCE—DEFINITENESS.** An ordinance prohibiting the keeping of a livery stable in any block in which two-thirds of the buildings are residences, "within two hundred feet of any such resi-

LIVERY STABLE KEEPERS—CONTINUED.

dence on either side of the street," unless owners of a majority of the lots "in such block" consent, is not void for indefiniteness as to the blocks to be considered in determining the number of the residences; as it is clear that consent is to be obtained of the owners of the block in which the stable is to be located. *Spokane v. Camp*. 554

2. **SAME—VALIDITY—MUNICIPAL CORPORATIONS—ORDINANCES—DELEGATION OF LEGISLATIVE POWERS.** An ordinance prohibiting the keeping of a livery stable in a block in which two-thirds of the buildings are used for residence purposes, unless the owners of a majority of the lots in such block consent thereto, is not an unlawful delegation of the legislative powers of the city council. *Spokane v. Camp*. 554

LOANS:

Authority of officers to make loans, see **BANKS AND BANKING**, 4.
Recovery of money loaned, see **PLEADING**, 2.

LOCATION:

Fishing locations, see **FISH**.

LOGS AND LOGGING:

Damages for obstruction of logging road, see **FRAUD**.

1. **LOGS AND LOGGING—LIENS—FORECLOSURE—ELOIGNMENT—ACTIONS—JOINDER—PARTIES.** In an action to foreclose liens upon several booms of logs, two of which had been eloigned and removed from the jurisdiction of the court by a defendant, he is a proper party to the foreclosure action, where it is alleged that he had also purchased the booms within the jurisdiction of the court, and damages may be awarded against him for the eloignment, and his demurrer for misjoinder of causes of action is properly overruled. *Grimm v. Pacific Creosoting Co.* 415
2. **SAME—LIEN ON PORTION OF LOGS FOR ENTIRE SERVICE.** Lien claimants who had worked for defendant for from one to six months, in getting out logs in several log booms, have a lien upon all the logs cut and secured during the time, and they need not prove that the services for which the lien was filed were all performed in cutting and securing the particular logs against which the lien was filed. *Grimm v. Pacific Creosoting Co.* 415
3. **SAME—COSTS—ATTORNEY'S FEES—LIABILITY OF ELOIGNER.** In an action foreclosing liens on certain logs, and for damages against a defendant for the eloignment of logs, it is error in entering personal judgment against the eloigner to tax as costs attorney's and receiver's fees allowed in the matter of the foreclosure. *Grimm v. Pacific Creosoting Co.* 415

LOSS:

Loss sustained by assured in liability insurance policy, see **INDEMNITY**.

MACHINERY:

Liability of employer for defects, see **MASTER AND SERVANT**.

MAIL:

Mailing of summons to defendant, see **PROCESS**.

MANDAMUS:

Failure to request findings in lower court as waiver of objection on review, see **APPEAL AND ERROR**, 9.

To compel entry of judgment after remand, see **APPEAL AND ERROR**, 55.

To compel commissioners to provide county surveyor with instruments, see **COUNTIES**, 1.

Enforcement of judgment against state dental board, see **STATES**, 5.

1. **MANDAMUS—PARTIES—NAME OF PLAINTIFF—PLEADINGS—AMENDMENT.** Under Bal. Code, § 5738, providing that a party prosecuting a special proceeding may be known as the plaintiff and the adverse party as the defendant, it is not error to refuse to quash a proceeding commenced in the name of the real party in interest, instead of in the name of the state on his relation according to sanctioned practice, especially where the plaintiff was required to amend the complaint to cure the objection made. *State ex rel. Cicoria v. Corgiat* 95
2. **SAME—PROCEEDINGS—SUMMONS AND COMPLAINT.** A mandamus proceeding may be commenced by the filing and service of a summons and complaint, rather than by motion and affidavit. *State ex rel. Cicoria v. Corgiat* 95
3. **MANDAMUS—PLEADING—GENERAL DEMURRER—APPEAL—TAXATION—Costs.** A general demurrer to a petition in mandamus to compel the listing of moneys and credits for taxation is properly overruled, since the petition states a cause of action as to "moneys"; but entry of judgment as demanded is error, and should be reversed as to the "credits," with costs to the appellant. *State ex rel. Wolfe v. Parmenter* 164

MANDATE:

To lower court on decision on appeal or writ of error, see **APPEAL AND ERROR**, 55.

MARRIAGE:

See **HUSBAND AND WIFE**.

1. **MARRIAGE—EVIDENCE—SUFFICIENCY—PRESUMPTIONS.** The uncontradicted testimony of both parties that they were married by a minister authorized by law to solemnize marriage and that they lived together as husband and wife for some years, is sufficient to establish the validity of a marriage, even although there was to be overcome the presumption arising from a second marriage by the

MARRIAGE—CONTINUED.

- husband without having obtained a divorce; and it is not necessary to show the publication of banns, license, or qualifications of the minister, all of which will be presumed until the contrary appears. *In re Sloan's Estate*..... 86
2. SAME—ESTOPPEL. One who has unlawfully contracted a second marriage while his first wife is living is not estopped to deny his second marriage, as against the administrators of the second woman's estate and her heirs, upon final distribution of the estate, although he joined in the petition for administration, describing the deceased as his wife. *In re Sloan's Estate*..... 86
3. MARRIAGE—ANNULMENT—GROUNDS—ACTIONS—FORM. Where it appears that a woman entered into a contract of marriage in good faith without knowledge that the man was incompetent by reason of having another wife, the court has power to annul the marriage without regard to the form of action commenced by her for redress. *Buckley v. Buckley*..... 213
4. SAME—RELIEF GRANTED—DIVISION OF PROPERTY. In an action for the annulment of a marriage entered into in good faith by the woman without knowledge that the defendant had another wife, the court has jurisdiction to dispose of the property as in the case of a divorce, under Bal. Code, § 5723, awarding the plaintiff such proportion as would be just and equitable, where she materially helped to acquire and save it. *Buckley v. Buckley*..... 213

MASTER AND SERVANT:

- Inconsistency of verdict with special finding as to contributory negligence, see TRIAL, 10.
- Recovery for services in family relation, see WORK AND LABOR.
1. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—DEFECTIVE MACHINERY—USE OF OTHER SAFE AGENCIES. The working place provided for an edgerman in a mill is not rendered unsafe by the mere fact that live skids used to convey the lumber from the live rolls to the edger had become worn and too low, so that obstructions were liable to occur on the live rolls near the plaintiff's working place, where the live skids were merely a labor saving device for the conveyance of the lumber and the master had stationed employees whose duty it was to look after obstructions when the skids failed to perform their functions; since the live skids, even if too low, were not inherently dangerous, and their use not negligence so long as other safe agencies were employed; the proximate cause of the injury being the negligence of a fellow servant and not the defective condition of the skids. *Carlson v. Weyerhaeuser Timber Co.*..... 490
2. MASTER AND SERVANT—NEGLIGENCE—SAFE APPLIANCE—EVIDENCE—SUFFICIENCY. In an action for the death of a fireman on a logging engine, who jumped when the train ran away on a steep grade, there is no sufficient evidence of negligence on the part of defendant, and

MASTER AND SERVANT—CONTINUED.

- a nonsuit is properly granted, although there was evidence tending to show that the rails were light, not entirely even and somewhat worn when put down, that while the cars were of standard make, the brakes could not be set while the train was in motion, that the brake blocks were worn, and the engine lighter than some engines, where there was no evidence that the defects rendered the appliances unsafe, but use for a year had demonstrated their safety; since it is not negligence to fail to use the best possible equipment. *Cavaness v. Morgan Lumber Co.*..... 232
3. MASTER AND SERVANT—NEGLIGENCE OF MASTER—SAFE PLACE—FALL OF CHISEL. There is no negligence shown on the part of a master, and a nonsuit is properly granted, where it appears that a servant, engaged in washing the floor of a reservoir while carpenters overhead were shingling the roof, was injured by the fall of a chisel used by them in their work in the ordinary and usual way, using ordinary tools, all of which was familiar to the plaintiff, that the chisel was shaken and dropped down after being stuck in the roof, and there was no evidence that such was not the usual and a reasonably safe place for it. *Taylor v. Washington Mill Co.*..... 306
4. MASTER AND SERVANT—NEGLIGENCE OF MASTER—DUTY TO WARN—DANGEROUS PLACE. In an action to recover injuries sustained by one employed in a smelter in removing copper bars dropped on a table at irregular intervals by a conveyor, there is sufficient evidence to make a case for the jury, where it appears that the bars weighed about 200 pounds, and, were dropped at the rate of two or three a minute, and were not long in view, that the men reached across and dragged the bars from the table by hand, that plaintiff had not previously done such work and was not instructed or warned that the conveyor did not drop the bars at regular intervals, which fact was unknown to the plaintiff, whereby a bar dropped and fell upon plaintiff's hand; since it was the duty of the master to warn him of the irregularity in the movement of the bars, as the same was not apparent and increased the dangers of the place. *Olsen v. Tacoma Smelting Co.* 128
5. MASTER AND SERVANT—SAFE PLACE—EXCAVATIONS—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. It is a fair inference that a place was rendered unsafe by the negligence of the master where the evidence showed that, in excavating for a pipe line where the pipe forked, a tongue of earth was left, that the removal of the same was attempted under the direct supervision of a foreman, by undermining and pushing over sections, one of which fell on the deceased while working as instructed at a certain place, and that the sections were too long to be handled with safety unless braced. *Hilgar v. Walla Walla.* 470
6. SAME—VICE PRINCIPALS. A saw filer in a mill, who assumed the duties of foreman on a day when the latter was absent, must be held to be a vice principal until the contrary is shown. *Johnson v. Motor Shingle Co.* 154

MASTER AND SERVANT—CONTINUED.

7. MASTER AND SERVANT—SAFE PLACE—DEFECTIVE SCAFFOLD—FELLOW SERVANTS. Where plaintiff, a common laborer, assisted carpenters in the construction of a scaffold, by passing material to them, without any voice in its selection or the manner of construction, and after it has served its purpose, the master directed the plaintiff to go upon the scaffold for the purpose of removing it, the master adopts and guarantees the same as a safe place to work, and is liable for an injury sustained by reason of negligent or improper construction; as the carpenters are not fellow servants as to the plaintiff. *Cheat-ham v. Hogan*..... 465

8. MASTER AND SERVANT—VICE PRINCIPALS—OPERATION OF RAILROADS—SUDDEN STOPPING OF CAR. A section foreman in charge of a hand car, which all of the men are propelling by hand on their way to their work, is a vice principal, and the master is liable for injuries sustained by one of the crew through his negligence, where it appears that, by his direction, knowing that he would soon meet a freight train, the car was being driven at a reckless rate of speed, down grade, where there were many curves and bluffs obstructing the view, in an endeavor to reach his destination before arrival of the train, and that, upon the train's appearing in sight, he suddenly applied the brakes without warning, whereby the plaintiff was thrown from the car. *Tills v. Great Northern R. Co.*..... 536

9. SAME—FELLOW SERVANTS—DIFFERENT DEPARTMENTS. A servant employed in washing the floor of a reservoir, and carpenters engaged in shingling the roof of the reservoir, then in the course of construction, are fellow servants, and the defendant is not liable for an injury to the former by reason of the negligence of the latter in allowing a chisel to fall, where the injured servant knew that the carpenters were at work overhead using ordinary tools in the usual and ordinary way, although they were working under the direction of a different foreman. *Taylor v. Washington Mill Co.*..... 306

10. SAME—ASSUMPTION OF RISKS. A laborer in a logging camp riding on the bite of the cable line in front of the tall block, which practice was dangerous from the fact that the tall block might give way, does not assume the risk from other dangers caused by reason of the negligent taking away of a support of the line, unknown to him, where his injury was not caused by the tall block. *Howland v. Standard Milling & Logging Co.*..... 34

11. MASTER AND SERVANT—ASSUMPTION OF RISKS—RAILROADS—OPERATION—DEFECTIVE CONDITION OF SWITCH YARD—EVIDENCE—SUFFICIENCY. An experienced railway switchman, who has worked thirteen days in an unfinished yard then in course of construction, assumes the risk, and a nonsuit is properly granted, where he was riding on the foot-board and could see a considerable distance ahead and could signal

MASTER AND SERVANT—CONTINUED.

- the locomotive to stop at any time, that earth was piled alongside the tracks for surfacing, and that the footboard caught on such earth causing a derailment and resulting in his injury, the conditions being open and apparent. *Morrison v. Williams*..... 30
12. MASTER AND SERVANT—ASSUMPTION OF RISKS—SAFE PLACE—STARTING MACHINERY WITHOUT WARNING. An inexperienced employee directed by an acting foreman to lift up a bull chain used to drag logs from the pond, for the purpose of making repairs, does not assume the risks from the starting of the chain by the drag sawyer, as he had a right to assume that proper notice would be given the sawyer and the place kept safe by withholding further movement until the repairs were made. *Johnson v. Motor Shingle Co.*..... 154
13. MASTER AND SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY. The plaintiff does not, as a matter of law, assume the risk from being entangled in rope, used by a foreman in attempting to replace a pulley on a line shaft while the machinery was running at full speed, where it appears from his testimony that the plaintiff was ordered to the place to assist the foreman, that he relied on the machinery being slowed down as was customary, that an unsafe frayed out rope that was dangerously long was used by the foreman without plaintiff's knowledge, and the evidence as to the powers of the foreman as a vice principal was conflicting; and it would be immaterial that a fellow servant selected the rope. *Jasper v. Bunker Hill & Sullivan Mining & Concentrating Co.*..... 570
14. SAME—CUSTOMARY METHODS. Where one is injured by the negligence of the master while pursuing his work in the customary way of doing the work, the accident not being the result of natural conditions, whether he ought to have adopted some other way is a question of fact for the jury and not of law for the court. *Howland v. Standard Milling & Logging Co.*..... 34
15. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE. A shoveler at an ash pit in an engine yard is guilty of contributory negligence, precluding any recovery, and a nonsuit is proper, where it appears that while in the ash pit waiting for the engine to be moved he stood with his back to the engine, out of sight of the driver, and unconsciously placed his hand on the rail near the wheel, so that his fingers were cut off as the engine started to move off, and it appears from his own evidence that he left a place of safety and was not giving attention to his surroundings. *Dorgan v. Northern Pac. R. Co.*..... 342
16. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OPERATION OF TRAINS—FAILURE TO OBSERVE RULES. Where a freight train was overtaken and run into by another train, the conductor of the first train is guilty of contributory negligence, precluding any recovery for injuries sustained in the collision, where it appears conclusively

MASTER AND SERVANT—CONTINUED.

- that his train was delayed, that he failed to observe the rules of the company for the protection of his train under the circumstances of the case, either in spirit or letter, and that had he done so the accident would not have occurred. *Boucher v. Oregon R. & Nav. Co.* 627
17. SAME—CONTRIBUTORY NEGLIGENCE—ASSURANCE OF MASTER—OBVIOUS DANGERS. An employee is not guilty of contributory negligence in working in a ditch seven feet deep, undermining a section of earth, where it appears that he was called by the foreman from other work and instructed to assist in that particular work at a certain place; since he had a right to rely on the assurance of the master as to the safety of the place selected, unless the danger was so obvious that there could be no two opinions about it. *Hilgar v. Walla Walla* 470
18. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—OPERATION OF MACHINERY—EVIDENCE—SUFFICIENCY. One employed as a second loader in a logging camp, whose hand was injured while pulling slack and unwinding line from the spool of a donkey engine, is guilty of contributory negligence precluding any recovery, where it appears, that it was obvious to one of his experience that there was danger in getting his hand caught in pulling slack through the block if the line was held after it was reversed, and he frankly admitted that he was paying no attention, and there was ten feet of loose line at the time, giving him opportunity to let go, or detach his glove caught on the line, in case he had been paying attention. *Johnson v. Coates Logging Co.*..... 679
19. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—EVIDENCE—SUFFICIENCY. It is negligence to remove one of the pulleys supporting a haul-back cable connected with a donkey engine used in hauling logs in the woods, thereby dropping the cable to the ground so that it caught on an obstruction, where it was known that it was the custom of the plaintiff, an employee attending the haul, to ride back on a sled pulled by the line, and that he would soon come within the zone of danger caused by taking away the support. *Howland v. Standard Milling & Logging Co.*..... 34
20. SAME—FELLOW SERVANTS—VICE PRINCIPALS—SAFE PLACE. In such case, the act of a co-laborer in taking away the support, by order of the foreman, is not the act of a fellow servant, but of a vice principal, since it was the master's duty to provide a safe place to work, and the foreman and co-laborer both represented the master in removing the block. *Howland v. Standard Milling & Logging Co.*..... 34
21. SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In such a case the plaintiff's contributory negligence, and his assumption of risks, is for the jury, where he testified that he did not notice the changed conditions, and there is room for a reasonable difference of opinion. *Howland v. Standard Milling & Logging Co.*..... 34

MASTER AND SERVANT—CONTINUED.

22. SAME—INSTRUCTIONS AS TO ISSUES—PLEADING. It is not error to instruct the jury that a complaint for personal injuries averred that copper bars fell irregularly, of which fact the plaintiff was not warned, when the complaint only alleged generally that the place was dangerous, where general allegations covered the details stated, and where the details were set forth in reply to an answer of assumption of risks, and the irregularity of the movement of the bars was within the issues. *Olsen v. Tacoma Smelting Co.*..... 128

MEASURE OF DAMAGES:

See FRAUD.

For fraud of partner in sale of partnership property, see PARTNERSHIP.

MECHANICS' LIENS:

Liens on logs and lumber, see LOGS AND LOGGING.

1. MECHANICS' LIENS—PARTIES—CORPORATION SUCCEEDING PARTNERSHIP—NOTICE—LEASEHOLD ESTATE. Where property was leased to a partnership, which assigned the lease to a corporation of the same name formed for the purpose, a subcontractor claiming a mechanics' lien against the leasehold is not excused from making the corporation a party by reason of the fact that there was no apparent change in the management or possession, where the corporation had taken possession more than a year before the work was done, was in possession at the time, made the original contract, and there was no concealment or fraud. *Rees v. Wilson*..... 339
2. SAME—LIMITATIONS—LAPSE OF LIEN. A mechanics' lien lapses unless action is commenced against the owner of the property within eight months after the filing of the lien claim. *Rees v. Wilson*.. 339
3. MECHANICS' LIENS—FORECLOSURE—PARTIES—ACTIONS—JOINDER OF CAUSES—PERSONAL JUDGMENT AGAINST CONTRACTOR—HUSBAND AND WIFE. In an action to foreclose a mechanics' lien, it is proper to join as defendants the contractor who purchased the material and his wife, as a community, and the plaintiff is entitled to a personal judgment against them as for a community debt for the material purchased, as well as a lien against the property of the other defendants, without a jury trial; and the same would not be an improper joinder of causes of action. *Rasmusson v. Liming*..... 184

MEMORANDA:

Required by statute of frauds, see FRAUDS, STATUTE OF.

METHOD:

Mode of assessment for local improvement, see MUNICIPAL CORPORATIONS, 6, 7.

METHOD OF WORK:

Safety of method, question for jury, see MASTER AND SERVANT, 14.

MINES AND MINERALS:

Evidence of employment of agent and fraud in inducing contract of sale of mining claims, see **PRINCIPAL AND AGENT**.

MINORS:

Running of statute against minors, see **LIMITATION OF ACTIONS**, 3.

MISCONDUCT:

Of judge, comment on evidence, see **TRIAL**, 4-6.

MISTAKE:

Correction of record by supplemental record, see **APPEAL AND ERROR**, 26.

Ground for reformation of instrument, see **REFORMATION OF INSTRUMENTS**.

In assessing property, relief from, see **TAXATION**, 6.

MODIFICATION:

Of judgment by appellate court, see **APPEAL AND ERROR**, 52.

Of judgment, see **JUDGMENT**, 3-5.

MONEY:

Exemption from taxation, see **TAXATION**, 1-4.

MONEY LENT:

Admissions of answer in action to recover money loaned, see **PLEADING**, 2.

MONEY RECEIVED:

Recovery of price paid for land, see **VENDOR AND PURCHASER**, 8-11.

MORTGAGES:

Possession and payment of taxes as bar to redemption, see **ADVERSE POSSESSION**, 3.

Of personal property, see **CHATTEL MORTGAGES**.

Limitation of action by minors after foreclosure sale, see **LIMITATION OF ACTIONS**, 2, 3.

1. **SAME—PARTIAL RELEASE—EFFECT ON SUBSEQUENT LIENS.** The release by a mortgagee of a portion of mortgaged premises sufficient to satisfy the mortgage debt, after notice of the liens of judgment creditors of the mortgagor upon the balance of the mortgaged property, discharges the mortgage as to all the property. *Schaad v. Robinson* 283
2. **MORTGAGES—FORECLOSURE — ANSWER — PAYMENT — FRAUD.** An answer states a good defense to the foreclosure of a mortgage, where it alleges that the same is paid and satisfied and that the satisfaction was being withheld and the foreclosure is being prosecuted as a fraudulent conspiracy to eliminate defendants' liens against part of the property. *Schaad v. Robinson* 283

MORTGAGES—CONTINUED.

3. SAME—NOTICE TO MORTGAGEE—PLEADING—SUFFICIENCY. An allegation in an answer that a mortgagee had full and actual knowledge of subsequent liens upon part of the mortgaged premises at the time he released other portions of the property from the mortgage, is a sufficient allegation of notice operating to release *pro tanto* the balance of the property. *Schaad v. Robinson*..... 283
4. MORTGAGES—FORECLOSURE — PARTIES — NECESSARY PARTIES DEFENDANT. Minor heirs of a deceased mortgagor of community property are necessary parties defendant to an action to foreclose the mortgage. *Schlarb v. Castaing*..... 331
5. MORTGAGES — FORECLOSURE — JUDGMENT — LIEN — VENDOR AND PURCHASER—CONSTRUCTIVE NOTICE OF SALE. A judgment of the superior court being a lien upon real property of the judgment debtor in the county, from the date of its entry under Laws 1893, p. 65, a judgment of foreclosure of a mortgage is constructive notice of the sale and proceedings thereunder, without the filing of any notice of *lis pendens* or certificate of sale in the recorder's office; and subsequent purchasers from the mortgagor take an inferior title regardless of the fact of their taking possession and making improvements in good faith. *Young v. Davis*..... 504
6. MORTGAGES—FORECLOSURE—CONFIRMATION—EFFECT. Confirmation of a mortgage foreclosure sale, regularly made, under a decree regular on its face and reciting service on all the defendants, cures defects in the matter of publishing the notice of sale. *Johnson v. Bartlett* 114

MUNICIPAL CORPORATIONS:

- Police power in general, see CONSTITUTIONAL LAW, 2.
 - Estoppel of city to condemn street after abandonment of former proceedings, see EMINENT DOMAIN, 11.
 - Delegation to city of power to control sale of intoxicating liquors, see INTOXICATING LIQUORS.
 - Ordinance restricting location of livery stables, see LIVERY STABLE KEEPERS.
 - Street railroads, see STREET RAILROADS.
 - Invalidity of amendment to charter requiring vote on ordinance granting railway franchise, see STREET RAILROADS, 2.
 - Execution of tax deed by city treasurer, see TAXATION, 13.
1. SAME—CHARTER—AMENDMENTS — LIMITATION BY GENERAL LAWS. The power to amend a city charter, under the direct amendment act, Laws 1903, p. 393, authorizing the submission of amendments to a vote of the people, is limited to the extent that amendments cannot be adopted that override a general statute of the legislature which deals directly and specifically with the subject in question. *Benton v. Seattle Electric Co.*..... 156

MUNICIPAL CORPORATIONS—CONTINUED.

2. MUNICIPAL CORPORATIONS—CITY COUNCIL. The "legislative authority" of a city, as used in the constitution and statutes of this state, means the mayor and city council. *Benton v. Seattle Electric Co.* 156
3. MUNICIPAL CORPORATIONS—SEWERS—ASSESSMENTS—STATUTES—IMPLIED REPEAL. Where the original charter and former statutes relating to sewers of cities of the third class provided that the cost should be paid by the city out of the sewer fund, and by Laws 1891, p. 406, special assessment of property benefited was authorized in cities of the 2nd, 3rd, and 4th classes, the proceeding to be initiated by petition of persons owning half of the property, and the lien enforced by a summary sale, all the prior laws so far as they related to sewers of cities of the third class are impliedly repealed by Laws 1903, p. 231, which specifically amends the charters of cities of the third class and provides for special assessments to be initiated by resolution or ordinance of the city council and enforced by an action of foreclosure; as they are inconsistent, and the intent to supersede prior laws is clear, although they are not expressly repealed. *Seattle Cedar Lumber Mfg. Co. v. Ballard* 123
4. SAME—ASSESSMENTS—VALIDITY—JURISDICTIONAL DEFECTS—CURATIVE STATUTES. Laws of 1905, p. 281, which provides that no special assessment can be set aside unless it be made to appear that the city authorities acted fraudulently, will be construed, in order to uphold its constitutionality, to reach only irregularities and not jurisdictional matters; hence the law of 1905 does not prevent the setting aside of an assessment void for want of jurisdiction; and failure to substantially follow the established statutory method is essentially a jurisdictional defect, rendering an assessment void. *Seattle Cedar Lumber Mfg. Co. v. Ballard* 123
5. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—VALIDITY. The right of way of an interstate railroad, used for and devoted exclusively to main line trackage purposes, may be assessed for benefits from a local improvement in an assessment district established by commissioners appointed for that purpose, although it is found as a fact that the premises are permanently adapted to railway uses as an approach to a permanent tunnel, and that they will not be actually benefited by the improvement as long as they are devoted to such use, but will be actually benefited in the amounts assessed if and when devoted to any other uses. *Seattle v. Seattle and Montana R. Co.* 132
6. SAME—STATUTES—CONSTRUCTION—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS. Laws of 1905, p. 84, § 22, providing that, in assessments for benefits from a municipal improvement, it shall be the duty "of the superior judge" and the commissioners to examine the locality and to estimate the proportion of the total cost that will be of benefit to the property, etc., might be unconstitutional

MUNICIPAL CORPORATIONS—CONTINUED.

- as delegating legislative power to the superior court, if construed literally to require the superior court judge to assist in making the assessment; and the inclusion "of the superior judge" in said action will be held an inadvertence, where it appears that the law viewed as an entirety limited the functions of the court to the appointment of commissioners and a judicial review of the assessment roll; and the law is therefore not invalid as delegating the levying of assessments to the superior court, or to other than the corporate authorities. *Seattle v. Seattle and Montana R. Co.*..... 132
7. SAME—MODE OF ASSESSMENT. An assessment for local improvements required to be made in proportion to the benefits received, is not invalid because made in accordance with the value of the property, where the commission determines that the benefits received were in proportion to such value. *In re Seattle*..... 402
8. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—SPECIAL FUND—DISTRIBUTION OF EXCESS—REFUNDING—PERSONS ENTITLED. Where the penalty and interest paid on delinquent assessments for a municipal improvement exceeds the warrants drawn on the special fund, thereby leaving a balance in the fund after the payment of all warrants drawn on the fund, the distribution of the excess should be to the property assessed based upon the original assessment, and the same cannot be recovered by the parties who paid the penalty and interest. *Miller v. Seattle*..... 252
9. SAME—DEMANDS FOR EXCESS—LIMITATIONS—POWER OF CITY COUNCIL. In such a case, a provision in the city charter that such excess shall be refunded in case demand be made therefor within two years after the date upon which assessment became due, and if not so demanded, shall be transferred to the general fund, is a reasonable statute of limitations within the power of the city council to fix, and bars a claim therefor made after the expiration of such period and nearly four years after the last outstanding warrant was paid. *Miller v. Seattle*..... 252
10. MUNICIPAL CORPORATIONS—ASSESSMENTS—APPEAL—REVIEW. An assessment by a commission of the benefits to property by reason of a local improvement will not be set aside as excessive upon conflicting evidence unless the evidence clearly preponderates against its correctness. *Seattle v. Felt*..... 323
11. MUNICIPAL CORPORATIONS—ASSESSMENTS—BENEFITS—APPEAL—REVIEW. The decision of the commission, appointed to determine the proportion of benefits received by property from a local improvement, in determining the property to be assessed and apportioning the costs involves questions of fact and largely of opinion, and the same will not be disturbed on appeal merely because differences of opinion arise. *In re Seattle*..... 402

MUNICIPAL CORPORATIONS—CONTINUED.

12. MUNICIPAL CORPORATIONS—STREETS—COLLISION OF PEDESTRIAN AND TEAM—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pedestrian crossing a city street diagonally in the middle of the block, who was struck by a delivery wagon, is guilty of contributory negligence, precluding any recovery, where it appears that he saw the wagon approaching at six or eight miles an hour as he stepped from the curb, but paid no further heed to it, supposing it would keep on its course, there were no other vehicles on the street, and he met the wagon at right angles, while the same was crossing to the other side of the street; the jury having found that the driver of the wagon did not see the plaintiff before he was struck in time to have avoided the accident. *Borg v. Spokane Toilet Supply Co.*..... 204

13. MUNICIPAL CORPORATIONS—STREETS—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pedestrian who was run down by a team at a street crossing is guilty of contributory negligence, as a matter of law, precluding any recovery, where it appears that he held an umbrella over his head in such a position as to prevent his seeing the approaching team, and that neither before or while crossing the street did he look in either direction for teams or vehicles, and was not looking around, and that if he had looked around he could have seen the team. *Dimuria v. Seattle Transfer Co.*..... 633

14. MUNICIPAL CORPORATIONS—ORDINANCES—SOLICITATION IN DEPOTS—CONTRACT VIOLATING ORDINANCE. An ordinance making it a misdemeanor for hack drivers to solicit customers for hire in railroad stations when used by passengers leaving or entering the same, prevents the owner of a depot from permitting such solicitation by contract granting the exclusive privilege of such solicitation. *Seattle v. Hurst* 424

15. MUNICIPAL CORPORATIONS—STREETS—UNGUARDED MANHOLE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. The questions of the negligence of a city in guarding a manhole in a sewer in course of construction, and of the contributory negligence of the plaintiff in falling into the same, are for the jury, where it appears that the testimony conflicts as to the barriers on one side of the hole, there being testimony to the effect that sections of sewer pipe placed as barriers stood so far apart and far back that one could easily pass between them without knowing thereof, that a red signal light was fifteen feet distant from that edge of the hole, and where it appears that the plaintiff, on a very dark night, in an endeavor to avoid a muddy crossing caused by the construction work, of which she had general notice, walked into the hole, being misled by the signal light, which she supposed marked the location of the hole. *Perry v. Centralia* 670

MUNICIPAL CORPORATIONS—CONTINUED.

16. SAME—EVIDENCE—SHOWING ULTIMATE LIABILITY OF CONTRACTOR—TRIAL—WITNESSES—CROSS-EXAMINATION. In an action against a city for personal injuries sustained by reason of street work carried on by a contractor, it is not error, on cross-examination of a son of the contractor for the purpose of showing his interest and discrediting his testimony, to show the fact that the contractor might be ultimately liable to the city for the amount of any recovery against the city. *Perry v. Centralia*..... 670
17. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—DIVERSION OF FUND—LIABILITY OF CITY—ACTIONS—PRESENTATION OF CLAIM. The right of action against a city for the wrongful diversion of a special assessment fund or for the wrongful failure and neglect to collect the same, is not upon the warrants against the fund or upon contract, but sounds in tort for damages; and hence no action can be commenced thereon without the presentation of a claim to the city, under charter provisions requiring all claims for damages to be presented to the city council and filed with the clerk within thirty days after the accrual of the claim, accurately locating and describing the defect that caused the injury, and providing that no action shall be maintained against the city for any claim for damages until after the lapse of sixty days after such presentation. *Jurey v. Seattle*. 272
18. MUNICIPAL CORPORATIONS—NOTICE OF CLAIM—DEFECTIVE SIDEWALK—DESCRIPTION OF DEFECT—SUFFICIENCY. A claim against a city reasonably notifies the city of the nature of the defect and is therefore sufficient where it avers that the plaintiff, while passing along the sidewalk at the northwest corner of a specified street crossing, fell through said sidewalk into a hole thereunder, the walk at such place having been for a long time in a defective condition. *Falldin v. Seattle* 561
19. MUNICIPAL CORPORATIONS—CLAIMS—VERIFICATION—HUSBAND AND WIFE—COMMUNITY PROPERTY. A claim against a city for a personal injury to a wife may be verified by the husband alone, as it is community property. *Matthews v. Spokane*..... 107

NECESSITY:

For stating specific grounds in order granting new trial, see NEW TRIAL.

NEGLIGENCE:

See ELECTRICITY.

Of carrier as to passenger, see CARRIERS.

Inadequate and excessive damages, see DAMAGES.

Defects or obstructions in highways, see HIGHWAYS, 6-8.

Of servant, see MASTER AND SERVANT, 15-18, 21.

Of employers, see MASTER AND SERVANT.

Care required of municipality as to streets and other ways, see MUNICIPAL CORPORATIONS, 15, 16, 18, 19.

NEGLIGENCE—CONTINUED.

Of person injured by defects or obstructions in street, see **MUNICIPAL CORPORATIONS**, 12, 13, 15.

Of person injured at railroad crossing, see **RAILROADS**.

In operation of street railroads, see **STREET RAILROADS**, 3-6.

Damages from negligent maintenance of water pipe line, see **WATERS AND WATER COURSES**, 3.

1. **NEGLIGENCE—DANGEROUS PREMISES—ACTIONS—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY.** There is sufficient evidence that the cause of plaintiff's injury was a cellar door, maintained by defendant between his two buildings and projecting over four feet into the street, where it appears that the distance between the two buildings was only twenty-three feet, that plaintiff left one of the buildings and had gone only a short distance when he fell on something and when he recovered he found himself lying on the cellar door, and other witnesses only a few feet distant heard the plaintiff cry out and found him injured on the door. *Johns v. Ash*..... 559

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES**.

NEW TRIAL:

Review of discretionary ruling on motion, see **APPEAL AND ERROR**, 28, 29, 35-37.

Scope of after remand by appellate court, see **APPEAL AND ERROR**, 54.

On imposition of improper sentence, see **CRIMINAL LAW**, 7.

1. **NEW TRIAL—ORDER GRANTING—SPECIFICATION OF GROUNDS—NECESSITY.** In granting a new trial, asked on several grounds, it is discretionary to make a general order without stating specific reasons therefor, and not error to refuse a request to state the specific grounds. *Best v. Seattle*..... 533

NOMINATIONS:

For office, see **ELECTIONS**.

NOTES:

Promissory notes, see **BILLS AND NOTES**.

Memoranda or notes required by statute of frauds, see **FRAUDS, STATUTE OF**.

NOTICE:

Of appeal, see **APPEAL AND ERROR**, 15, 22-24.

Of proceedings to expel member, see **BENEFICIAL ASSOCIATIONS**.

Of foreclosure of mortgage, see **CHATTEL MORTGAGES**, 3.

For hearing of condemnation proceedings, see **EMINENT DOMAIN**, 9.

Condemnation proceedings, see **EMINENT DOMAIN**, 6, 7.

Judicial notice, see **EVIDENCE**, 1.

NOTICE—CONTINUED.

Defects or obstruction in highways, as affecting liability for negligence, see **HIGHWAYS**, 7.

Judgment of foreclosure as notice to subsequent purchasers, see **MORTGAGES**, 5.

To mortgagee in foreclosure suit, see **MORTGAGES**, 3.

Claim for injury from defects or obstructions in street, see **MUNICIPAL CORPORATIONS**, 18.

In tax foreclosure proceeding, failure to give name of owner, see **TAXATION**, 11.

OBJECTIONS:

Review as dependent on objection made on trial, see **APPEAL AND ERROR**, 8, 9.

Waiver on appeal, see **APPEAL AND ERROR**, 27, 30, 31.

Waiver of objections to information by entry of plea, see **INDICTMENT AND INFORMATION**.

OBSTRUCTING JUSTICE:

1. **OBSTRUCTING JUSTICE.** An information for resisting an officer in serving or attempting to execute any legal writ, rule, order or process as defined by Bal. Code, § 7208, is defective where it simply charges unlawfully resisting an officer in the levying of an execution issued by a justice of the peace on a certain judgment; but the same must aver that the process was a "legal" process in the language of the statute, or set out its terms so as to show the essentials of a legal process. *State v. Knapf*..... 229

2. **SAME—EVIDENCE—ADMISSIBILITY—LEGALITY OF PROCESS—KNOWLEDGE OF OFFICER.** In a prosecution for resisting an officer in the levying of an execution which was fair on its face, it is error to exclude evidence of an infirmity in the judgment and that the officer had notice thereof; since an officer is not protected by a writ fair on its face unless he acted in good faith, and would be a trespasser if he had notice of the invalidity of the writ. *State v. Knapf*..... 229

OBSTRUCTIONS:

Of highways, see **HIGHWAYS**, 4.

OFFICERS:

Resisting officer, see **OBSTRUCTING JUSTICE**.

OPINIONS:

Harmless error in admission of evidence of damages, see **APPEAL AND ERROR**, 46.

OPTION:

To sell to lessee, right of assignee to specific performance, see **LANDLORD AND TENANT**.

To purchase land, see **VENDOR AND PURCHASER**, 2, 3.

ORAL EVIDENCE:

See EVIDENCE, 4, 5.

ORDERS:

Time for taking appeal from final order, see APPEAL AND ERROR, 18.

Grant of new trial without stating specific grounds, see NEW TRIAL.

ORDINANCES:

City ordinance prohibiting solicitation by hack drivers as restriction on right of contract, see CONSTITUTIONAL LAW, 1.

Restriction by city as to location of livery stables, see LIVERY STABLE KEEPERS.

Preventing solicitation by hack drivers in depots, see MUNICIPAL CORPORATIONS, 14.

PAROL EVIDENCE:

See EVIDENCE, 4, 5.

PARTIAL INVALIDITY:

Effect of partial invalidity of statutes, see STATUTES, 1.

PARTIES:

Persons entitled to appeal, see APPEAL AND ERROR, 4-7.

Persons dismissed below as necessary, see APPEAL AND ERROR, 15.

For appointment of receiver for insolvent corporation, see CORPORATIONS, 2.

Rights and liabilities as to costs, see COSTS, 1, 2.

Right to sue for wrongful death, see DEATH, 1.

Joinder of in foreclosure of lien, see LOGS AND LOGGING.

In mandamus proceedings, see MANDAMUS.

On foreclosure of mechanic's lien, see MECHANICS' LIENS.

In action to foreclose mortgage, see MORTGAGES, 4.

Parties entitled to excess in special improvement fund, see MUNICIPAL CORPORATIONS, 8, 9.

Intervention by creditors in action against receiver, see RECEIVERS.

PARTNERSHIP:

Pleading in action against for recovery of price for land sold, see VENDOR AND PURCHASER, 9.

1. PARTNERSHIP—SALE OF BUSINESS—REMEDIES BETWEEN PARTNERS—FRAUD OF PARTNER—MEASURE OF DAMAGES. Where a partnership business was sold by one of two equal partners, who fraudulently secured his copartner's consent to the sale and misrepresented the price actually received, the measure of plaintiff's damages is the difference between the sum received by plaintiff from defendant and one-half of what the purchaser paid, even if the sum paid exceeded the actual value; since a fiduciary relation existed between the partners and plaintiff was entitled to his share of any profit made. *Finn v. Young*..... 543

PARTNERSHIP—CONTINUED.

2. **PARTNERSHIP—ACTIONS BETWEEN PARTNERS—FRAUD.** It is no answer to an action between partners to recover damages for fraudulent representations in the sale of the business that there should be an accounting and a reinstatement in the business, when the fraud was not discovered in time to gain relief in such an action. *Finn v. Young*. 543
3. **PARTNERSHIP—RECEIVERS—APPOINTMENT—SHOWING—SUFFICIENCY.** The appointment of a receiver in a suit between alleged partners in the publication of a book, upon the allegation that defendant denies the partnership and refuses to recognize the plaintiff or to account to him, is not warranted where it is not shown that the defendant was insolvent, and it appears that the book is not yet completed and cannot be without additional funds, that the partnership is without funds, and that the receivership would only result in failing to complete the book and realizing anything on the venture; since clear necessity must be shown for the appointment. *Smith v. Brown*. 240

PART PAYMENT:

Within statute of limitations, see **LIMITATION OF ACTIONS**, 1.

PAYMENT:

Acceptance of payment of or on judgment as waiver of right to appeal, see **APPEAL AND ERROR**, 7.

Evidence of payment of note, see **BILLS AND NOTES**, 2.

Part payment within statute of limitations, see **LIMITATION OF ACTIONS**, 1.

Of mortgage as defense to foreclosure suit, see **MORTGAGES**, 2.

Implied authority of agent to make collections, see **PRINCIPAL AND AGENT**.

Taxes paid, see **TAXATION**, 5.

PERFECTING TITLE:

See **VENDOR AND PURCHASER**, 6.

PERFORMANCE:

Of contract for sale of land, see **VENDOR AND PURCHASER**, 4-7, 12.

Waiver of right to performance of option agreement, see **VENDOR AND PURCHASER**, 3.

PERSONAL INJURIES:

See **MUNICIPAL CORPORATIONS**, 12, 13, 15, 16, 18, 19; **NEGLIGENCE**.

To passenger, see **CARRIERS**.

Inadequate and excessive damages, see **DAMAGES**.

Caused by electricity, see **ELECTRICITY**.

To traveler on highway, see **HIGHWAYS**, 6-8.

To employee, see **MASTER AND SERVANT**.

To traveler on highway crossing railroad, see **RAILROADS**.

To persons on cars or on or near street railroad tracks, see **STREET RAILROADS**, 4-6.

PERSONAL JUDGMENT:

On foreclosure of mechanics' lien, see **MECHANICS' LIENS**, 3.

PETITION:

In condemnation proceedings, see **EMINENT DOMAIN**, 6-8.

PHYSICIANS AND SURGEONS:

Liability of decedent's estate for services of, see **EXECUTORS AND ADMINISTRATORS**, 1.

PLACE:

Criminal jurisdiction as dependent on locality of offense, see **CRIMINAL LAW**, 1.

PLEA:

Entry of plea as waiver of objections to information, see **INDICTMENT AND INFORMATION**.

PLEADING:

Prayer as determining amount in controversy on appeal, see **APPEAL AND ERROR**, 2.

Waiver of objections to rulings on, see **APPEAL AND ERROR**, 30.

Presumption as to amendment, see **APPEAL AND ERROR**, 32.

Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 44.

On bills and notes, see **BILLS AND NOTES**, 1.

In suits for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**, 2.

Action for causing death, see **DEATH**, 1.

In actions on insurance policies, see **INSURANCE**, 3.

Defects as grounds for collaterally attacking judgment, see **JUDGMENT**, 8.

Judgment on admission, see **JUDGMENT**, 1, 2.

In mandamus proceedings, see **MANDAMUS**.

For injuries to servant, see **MASTER AND SERVANT**, 22.

Foreclosure of mortgages, see **MORTGAGES**, 2, 3.

In action against receiver, complaint of interveners, see **RECEIVERS**.

In action for injuries by street cars, see **STREET RAILROADS**, 3.

Right of jury to take pleadings to jury room, see **TRIAL**, 8.

For purchase price of land, see **VENDOR AND PURCHASER**, 9.

In in action for services in family relation, see **WORK AND LABOR**.

1. **PLEADING — ACTIONS — CONDITIONS PRECEDENT — STATUTES.** Bal. Code, § 4934, requiring the plaintiff to plead the performance of all conditions upon which the action is based has reference only to conditions precedent or necessary to the creation of the contract or to the perfecting of the right of action, and not to conditions subsequent. *Port Blakely Mill Co. v. Hartford Fire Insurance Co.* 657

PLEADING—CONTINUED.

2. PLEADING—ANSWER—ADMISSIONS—MONEY LOANED. An answer as a whole admits that a sum was received by defendants as a loan, where, in an action for money loaned, the answer admits that a portion was to be regarded as a loan, and the claim is then made that the other portion was to be applied upon a board bill due from plaintiff to defendant, and which thereby paid the board bill leaving nothing further due thereon, and a further clause in the answer alleges that no part of the board bill had been paid and that the same is now due and owing, thereby neutralizing the claim that only part of the money was a loan. *Hendelman v. Kahan*..... 247
3. PLEADING—DEMURREE—DEFINITENESS. Want of definiteness in an answer must be taken advantage of by motion and not by demurrer. *Schaad v. Robinson*..... 283
4. PLEADING—AMENDMENT—CONSISTENCY—BILLS AND NOTES. In an action upon a note payable on demand in case the maker transfers his real estate before maturity, an amended complaint alleging the transfer of his real estate is not inconsistent with the original complaint alleging a transfer of "certain" of his real estate, and is allowable. *Loveday v. Parker*..... 260
5. PLEADING—DEPARTURE—DIVORCE—ANNULMENT OF MARRIAGE. It is not a material variance, that, in an action for a divorce, the plaintiff, in reply to an answer setting up the illegality of the marriage, proved the annulment of the marriage. *Buckley v. Buckley*.... 213

PLEDGES:

See CHATTEL MORTGAGES.

1. PLEDGES—PLEDGE OF CORPORATE STOCK—FORECLOSURE—MERGER OF LIEN—ENFORCEMENT OF DECREE—CUSTODY OF PLEDGED CERTIFICATE. Where a pledgee of a certificate of stock in a corporation has reduced its claim to judgment, foreclosing its lien on and directing a sale of the stock, its lien is merged in the judgment, and it is not entitled to possession of the certificate of the stock, but only to have the judgment carried into execution, and the only right of the pledgor is the right of redemption; the clerk of the lower court being the proper custodian of the certificate until redemption or sale. *American Bonding Co. v. Loeb*..... 104

POLICE POWER:

Ordinance prohibiting solicitation by hack drivers at railway station as exercise of police power, see CONSTITUTIONAL LAW, 2.

POLICY:

Of insurance, see INSURANCE.

POLL TAX:

For road purposes, see HIGHWAYS, 3.

POSSESSION:

See ADVERSE POSSESSION.

By receiver of property in bankruptcy proceedings, see BANKRUPTCY.

Custody of pledged certificate of stock, see PLEDGES.

POWERS:

Exercise of power of sale in chattel mortgage, possession of property, see CHATTEL MORTGAGES, 3.

PRACTICE:

See APPEAL AND ERROR; CONTINUANCE; COSTS; CRIMINAL LAW; DIVORCE; JUDGMENT; NEW TRIAL; PLEADING; PROHIBITION; TRIAL.

Prosecution of actions in general, see ACTIONS.

Procedure of particular courts, see COURTS.

Condemnation proceedings, see EMINENT DOMAIN.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 42-51.

PREMIUMS:

Forfeiture of policy for nonpayment of note given as premium, see INSURANCE, 2.

PRESCRIPTION:

Establishment of highways, see HIGHWAYS, 1, 2.

PRESENTMENT:

Of claim against municipality, see MUNICIPAL CORPORATIONS, 17.

PRESUMPTIONS:

As to fraud in conveyance of property, see FRAUDULENT CONVEYANCES.

As to due service of process, see JUDGMENT, 6, 7.

As to marriage, see MARRIAGE, 1.

PRIMARY ELECTIONS:

See ELECTIONS.

Sufficiency of title of act, see STATUTES, 2.

PRINCIPAL AND AGENT:

See BROKERS.

Authority of bank officers to make loans, see BANKS AND BANKING, 4.

Liability of carrier for acts of employees in ejecting passengers, see CARRIERS, 5, 6.

Liability of agent to third person for fraud in obtaining deed, see CANCELLATION OF INSTRUMENTS, 1.

Representation of corporation by agent, see CORPORATIONS, 1.

Ratification by owner of contract of sale, see VENDOR AND PURCHASER, 1.

PRINCIPAL AND AGENT—CONTINUED.

1. **PRINCIPAL AND AGENT—EMPLOYMENT—VENDOR AND PURCHASER—FRAUD—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to show that the plaintiffs, the vendors in a written contract of sale of mining claims for \$10,200, had employed the defendants to act as their agents in effecting a sale for \$10,000, agreeing to pay a commission, and that they were induced through fraud to execute the contract to one of the defendants to enable them to negotiate a sale, when the agents in fact were making a sale for \$60,000, where it appears that the contract was an unambiguous one to sell the property to one of the defendants within two years upon the payment of installments, and there were no circumstances justifying an inference that the real agreement differed from the writing, which must accordingly conclude the parties; and the fact that in about a year the vendee in the contract was enabled to make a sale of the claims, with others, for \$60,000 is immaterial. *Townsend v. Dilsheimer* 294
2. **PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—ACCORD AND SATISFACTION.** An agent is shown to have had authority to make an accord and satisfaction of the amount due on promissory notes secured by chattel mortgage, by accepting the mortgaged and other property in discharge of the debt, pending a foreclosure, where it appears that the agent sold the machinery for which the notes were given, received the notes and mortgage, collected all payments, conducted the foreclosure, and received the property given in satisfaction. *Northwest Thresher Co. v. Dahlgren* 325

PRINCIPAL AND SURETY:

See INDEMNITY.

Execution of appeal bond, see APPEAL AND ERROR, 21.

PRIORITIES:

Of mortgages, see CHATTEL MORTGAGES, 2.

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1.

In grants to waters of artesian well, see WATERS AND WATER COURSES, 2.

PROBATE:

Conclusiveness of proceedings, failure to present claim against estate, see EXECUTORS AND ADMINISTRATORS, 4.

PROCESS:

Service of notice of appeal, see APPEAL AND ERROR, 15, 22, 24.

Condemnation proceeding, see EMINENT DOMAIN, 6, 7.

Defects in process as grounds for vacating judgment, see JUDGMENT, 6, 7.

Commencement of mandamus proceedings, see MANDAMUS, 2.

In foreclosure of delinquency tax certificate, see TAXATION, 9-11.

PROCESS—CONTINUED.

1. **PROCESS—PUBLICATION—MAILING SUMMONS—JUDGMENTS—VACATION—FRAUD.** Where plaintiff knew a nonresident defendant's post-office address, service by publication without mailing a copy of the summons confers no jurisdiction, although plaintiff made affidavit that he did not know defendant's "residence"; and the judgment is properly vacated for fraud. *Noble v. Aune*..... 73

PROHIBITION:

1. **PROHIBITION—TO COURTS—WHEN LIES—INADEQUACY OF REMEDY BY APPEAL.** The remedy by appeal is inadequate, and prohibition lies to prevent the superior court from proceeding to review the action of a city council on certiorari from the revocation of a liquor license, where it appears that the license would expire before the case could be heard on appeal. *State ex rel. Puyallup v. Superior Court*... 650
2. **SAME—REMEDY BY CERTIORARI.** Where the remedy by appeal is inadequate because the right would expire before an appeal could be heard, prohibition lies notwithstanding a remedy by certiorari, where the result would be the same whether determined on certiorari or prohibition. *State ex rel. Puyallup v. Superior Court*. 650

PROMISSORY NOTES:

See **BILLS AND NOTES.**

PROPERTY:

Adverse possession, see **ADVERSE POSSESSION.**
 Division on awarding divorce, see **DIVORCE, 2, 3.**
 Taking for public use, see **EMINENT DOMAIN.**
 Division on annulment of marriage, see **MARRIAGE, 4.**
 Property subject to taxation, see **TAXATION, 1-4.**

PROXIMATE CAUSE:

Of death by wrongful act, see **DEATH, 2.**

PUBLICATION:

Service of process, see **PROCESS.**

PUBLIC IMPROVEMENTS:

By cities, see **MUNICIPAL CORPORATIONS, 3-11.**

PUBLIC LANDS:

Interests in, as subject to execution, see **EXECUTION.**
 Right of way over public lands, see **HIGHWAYS, 1, 2.**

PUBLIC USE:

Necessity of order adjudging public use, see **EMINENT DOMAIN, 10.**

PUGET SOUND:

Fishing locations in waters of, see **FISH.**

QUASHING:

Garnishment, see **GARNISHMENT**.

QUESTION FOR JURY:

See **MASTER AND SERVANT**, 13, 14.

Negligence of person injured through defect in highway, see **HIGHWAYS**, 8.

Negligence of person injured by fall in unguarded manhole, see **MUNICIPAL CORPORATIONS**, 15.

In civil actions in general, see **TRIAL**, 2, 3.

QUIETING TITLE:

Right of defendant to counterclaim for money paid on contract of sale, see **SET-OFF AND COUNTERCLAIM**.

1. **QUIETING TITLE—EVIDENCE OF TITLE—JUDICIAL PROCEEDINGS—TAXATION.** A distribution in probate proceedings of the property of the deceased to his heirs is some evidence of title, without deraignment of title from the government, and sufficient to support a judgment removing the cloud of tax foreclosure proceedings against land assessed to the deceased, as to parties claiming through the same source. *Preston v. Cox*..... 451

RAILROADS:

Ordinance prohibiting solicitation by hack drivers at railway station as exercise of police power, see **CONSTITUTIONAL LAW**, 2.

Occupation of highway as ground for compensation, see **EMINENT DOMAIN**, 3.

Injunction to restrain operation of railroad, see **EMINENT DOMAIN**, 14.

Risks assumed by servant, see **MASTER AND SERVANT**, 11.

Injuries to employees, see **MASTER AND SERVANT**, 2, 8, 11, 15, 16.

Liability of property to assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 5.

Contract in violation of city ordinance prohibiting solicitation by hack drivers in depots, see **MUNICIPAL CORPORATIONS**, 14.

Railroads in city streets, see **STREET RAILROADS**.

Special findings as to negligence in operation of train, consistency with general verdict, see **TRIAL**, 10.

1. **RAILWAYS—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE.** The driver of an open buggy is guilty of contributory negligence in not stopping to look and listen before driving upon an interurban railway track, precluding any recovery, where it appears that he knew the train was approaching and that the trains were customarily run at high speed, although there were freight cars obstructing the view to some extent and he expected the train to slow down to stop at the station. *Cable v. Spokane & Inland Empire R. Co.*..... 619

RAILROADS—CONTINUED.

2. **SAME—PASSENGER IN A BUGGY.** Where the driver of an open buggy is guilty of contributory negligence in driving upon an inter-urban railway crossing without stopping to look or listen, his daughter riding with him, seventeen years of age, is likewise subject to the rules that she must "stop, look, and listen," in the absence of a showing that she endeavored to stop the horse or have her father do so, or any attempt on her part to take precaution, or that she was prevented from doing so. *Cable v. Spokane & Inland Empire R. Co.* 619

RATIFICATION:

- Of act of corporate officer or agent, see **CORPORATIONS**, 1.
- Of contract of sale with broker, see **VENDOR AND PURCHASER**, 1.

REAL ESTATE AGENTS:

- See **BROKERS**.

REAL PROPERTY:

- Effect of statute of frauds on agreement relating to real property, see **FRAUDS, STATUTE OF**.
- Limitation of actions to recover, see **LIMITATION OF ACTIONS**, 2, 3.
- Conveyance, see **VENDOR AND PURCHASER**.

RECEIVERS:

- In bankruptcy, see **BANKRUPTCY**.
 - Of corporations in general, see **CORPORATIONS**, 2.
 - Settlement of partnership accounts, see **PARTNERSHIP**.
 - Appointment of to apply funds in satisfaction of judgment against state dental board, see **STATES**, 6.
1. **RECEIVERS—ACTIONS—PLEADINGS—PARTIES—RIGHT TO INTERVENE—REPRESENTATION OF CREDITORS.** Where an action is brought against the receiver of an insolvent, to recover property of the insolvent, and the receiver defends for the benefit of creditors, a complaint in intervention on behalf of certain creditors is demurrable as showing no right to intervene, where it sets up the same claims made on their behalf by the receiver in an answer filed in their interest and in the interest of all creditors who file their claims; since the receiver represents the creditors. *Springer v. Ayer*..... 642

RECEPTION:

- Of verdict in civil actions, see **TRIAL**, 8.

RECITALS:

- As presumption of due service of process, see **JUDGMENT**, 6, 7.

RECORDS:

- Transcript on appeal or writ of error, see **APPEAL AND ERROR**, 25, 26.
 - Costs for documentary evidence, see **COSTS**, 3.
- 50—50 WASH.

REDEMPTION:

Possession and payment of taxes as bar to action, see **ADVERSE POSSESSION**, 3.

REFORMATION OF INSTRUMENTS:**1. REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE—SUFFICIENCY.**

Where a written contract for the sale of timber omitted to specify any time for its removal, reformation of the same is warranted where the only evidence as to the agreement of the parties on this point was that of the scrivener who reduced the contract to writing, and he testified that the parties agreed to give ten years for the removal of the timber, but that by mistake he omitted to insert that clause in the writing. *Preston v. Hill-Wilson Shingle Co.*..... 377

2. SAME—RELIEF GRANTED—JUDGMENT. Where, in an action to enjoin the removal of timber, defendant establishes his right to have the contract reformed to include a clause, omitted by mistake, giving him ten years in which to remove the same (two years of which has not yet expired) it is error to enter judgment requiring removal of the timber within a reasonable time after notice, as in the case of a contract failing to specify any time; but the contract should be reformed, requiring removal at any time within the period agreed upon. *Preston v. Hill-Wilson Shingle Co.*..... 377**RELEASE:**

Of mortgage, see **MORTGAGES**, 1.

REMAND:

Of cause on appeal or writ of error, see **APPEAL AND ERROR**, 54.

Of cause on appeal, see **CRIMINAL LAW**, 7, 9.

REPEAL:

Of statute relating to road tax, see **HIGHWAYS**, 3.

Implied repeal of statutes relating to sewers and payment of cost of, see **MUNICIPAL CORPORATIONS**, 3, 4.

REPLEVIN:

See **SET-OFF AND COUNTERCLAIM**.

Determination of amount in controversy to confer jurisdiction, see **APPEAL AND ERROR**, 3.

Allegations of complaint as determining jurisdictional amount for review, see **APPEAL AND ERROR**, 2.

1. REPLEVIN — ALTERNATIVE JUDGMENT — AMOUNT—FRAUDULENT CONVEYANCES. In an action of replevin against a receiver, where it appears that he was entitled to possession so far as he represented subsequent creditors in good faith, it is error to enter judgment in the alternative for the total amount of the claims of all creditors, in case return of the property to the receiver cannot be had, but the judgment must be reversed with directions to determine the amount of the claims of creditors entitled to the possession, in order to limit the alternative money judgment to such sum. *Springer v. Ayer*. 642

REPRESENTATION:

False representations, see FRAUD.

REQUESTS:

Requested instructions, see TRIAL, 7.

RESCISSION:

Cancellation of written instrument, see CANCELLATION, 3.

Mutual rescission of contract for sale of shingles, see SALES.

Of contract for sale of land, see VENDOR AND PURCHASER, 4, 5, 7.

RESERVATION:

In deeds, see DEEDS.

RES GESTAE:

In civil actions, see EVIDENCE, 2.

RESIDENCE:

For purposes of divorce, see DIVORCE, 1.

RES JUDICATA:

See JUDGMENT, 10.

RESPONSIVENESS:

Of answer by witness, see WITNESSES, 4.

RESTRICTIONS:

Ordinance restricting location of livery stables, see LIVERY STABLE
KEEPERS.

REVENUE:

See TAXATION.

REVIEW:

By higher court by appeal for errors or irregularities, see APPEAL
AND ERROR.

REVOCATION:

Of liquor license, see INTOXICATING LIQUORS.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 10-13, 21.

ROADS:

See HIGHWAYS.

SAFE PLACE TO WORK:

See MASTER AND SERVANT.

SALES:

Authority of broker to make binding contract to sell land, see **BROKERS**, 2.

Exercise of power of sale in chattel mortgage, custody of property, see **CHATTEL MORTGAGES**, 3.

Limitation in conditional sale of vendor's power to contract, see **CONTRACTS**, 1.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**.

Of intoxicating liquors, see **INTOXICATING LIQUORS**.

Fraud in sale of partnership property, see **PARTNERSHIP**.

Of real property, see **VENDOR AND PURCHASER**.

1. **SALES—CONTRACTS—RESCISSION.** A contract for the sale of shingles to be shipped in car load lots without delay, is mutually rescinded where it appears that the vendor manufacturer wrote asking the vendee not to rely upon it for the shingles because its dry kiln had burned and it could not get cars and it would be impossible to ship for some time, to which the vendee replied expressing sympathy for the loss by fire, and asking that notice be given when in shape to again make shipments. *West Coast Shingle Co. v. Markham Shingle Co.*..... 681
2. **SALES—WARRANTY—EVIDENCE—SUFFICIENCY.** There is not sufficient evidence that the sale of a stallion was upon a warranty that he would get with foal sixty-five per cent of all mares bred to him, where it appears that notes and a mortgage were given for the price and a written contract was made which did not contain the warranty, and there is a direct contradiction of defendants' evidence that the contract was rescinded and \$100 returned and that later the oral warranty was substituted and the \$100 again paid, and where the defendant who claimed the horse was worthless kept the horse and used him for two seasons without complaint or offer to return him, and then sold him to one of his attorneys for \$250. *Hartley v. Furgeson* 309

SELF-SERVING DECLARATIONS:

See **EVIDENCE**, 2.

SENTENCE:

Upon conviction of criminal offense, change of law, see **CRIMINAL LAW**, 4.

Remand on imposition of improper sentence, see **CRIMINAL LAW**, 7, 9.

SEPARATION:

Of witnesses on trial, see **TRIAL**, 1.

SERVANTS:

See **MASTER AND SERVANT**.

SERVICE:

See **WORK AND LABOR**.

SET-OFF AND COUNTERCLAIM:

Set-off of benefits against damage to land taken for highway purposes, see **EMINENT DOMAIN**, 4.

1. **SET-OFF AND COUNTERCLAIM—CAUSES ARISING FROM SAME TRANSACTION—REPLEVIN.** In an action of replevin for goods sold under a conditional bill of sale, the vendee may counterclaim for damages by reason of the vendor's breach of a contemporaneous agreement respecting the mode of payment, since the two contracts arise out of the same transaction. *Gilbert Co. v. Husted*..... 61
2. **SET-OFF AND COUNTERCLAIM—QUIETING TITLE—JUDGMENT.** In an action to quiet title by the cancellation of a contract of sale, upon which a first payment had been made, the defendant is not entitled to set up a counterclaim for the money paid, and a personal money judgment therefor is error, although repayment might have been adjudged a condition precedent to the equitable relief sought. *Kane v. Borthwick* 8

SEWERS:

Construction of, by municipality, see **MUNICIPAL CORPORATIONS**, 3.

SPECIAL VERDICT:

See **TRIAL**, 9, 10.

SPECIFIC PERFORMANCE:

Right of assignee of option, covenants against assignment, see **LANDLORD AND TENANT**.

Of contracts for sale of land, see **VENDOR AND PURCHASER**, 2, 3, 6.

1. **SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—CONTRACTS—TERMINATION—WAIVER OF RIGHTS BY REJECTING TITLE.** Where a contract to convey land provided that, if the vendors could not make a marketable title within a specified time after objections pointed out by the vendee, "the contract shall terminate and be at an end," the vendee is not entitled to specific performance after refusing to accept the title offered and insisting upon objections to the title in particulars which the vendors could not and would not make good, six months after the vendors had, for that reason, rescinded the contract; since his right to specific performance terminated on his rejection of the title and rescission of the contract. *Johnson v. Lara* 368

SPEED:

Instructions as to excessive speed by street car, see **STREET RAILROADS**, 4-6.

SPIRITUOUS LIQUORS:

See **INTOXICATING LIQUORS**.

SQUATTERS:

See **ADVERSE POSSESSION**, 2.

STABLES:

Restriction by city of location of livery stables, see **LIVERY STABLE KEEPERS**.

STARE DECISIS:

See **COURTS**.

STATES:

Nomination of state officers, see **ELECTIONS**, 7.

1. **STATES—STATE DENTAL BOARD—AUTHORITY TO EMPLOY ATTORNEY—CRIMINAL LAW—PROSECUTIONS—PRIVATE COUNSEL.** The authority of the state dental board to employ private counsel does not depend upon the consent of the prosecuting attorney, under Bal. Code, § 3031, requiring the consent of the prosecuting attorney to assistance by private counsel in prosecutions by the state dental board; consent being necessary only to participation in the prosecution. *Stern v. State Board of Dental Examiners*..... 100
2. **STATES—ACTION AGAINST BOARD.** An action and judgment against the state dental board is not against the state, and the state is not bound thereby. *Stern v. State Board of Dental Examiners*..... 100
3. **SAME—STATE BOARDS—ACTIONS—CAPACITY TO BE SUED.** The state dental board has incidental capacity to be sued by individuals, independently of statute, as a corporation *sub modo*. *Stern v. State Board of Dental Examiners*..... 100
4. **SAME—JUDGMENTS—AGAINST STATE DENTAL BOARD—ENFORCEMENT—SUPPLEMENTAL PROCEEDINGS.** Bal. Code, § 5676, providing for the manner of enforcing judgments against public corporations paying claims and demands by orders or warrants drawn on the treasurer, does not preclude supplemental proceedings to enforce a judgment against the state dental board, which under Bal. Code, § 3031, handles its funds and satisfies its claims the same as any individual or corporation. *Stern v. State Board of Dental Examiners*..... 100
5. **SAME—MANDAMUS—CONCURRENT REMEDY.** If judgment against the state dental board may be enforced by mandamus proceedings, under Bal. Code, § 5755, it is no more than a concurrent remedy, and does not exclude proceedings supplementary to the judgment. *Stern v. State Board of Dental Examiners*..... 100
6. **SAME—RECEIVERS—FUNDS OF STATE BOARD.** Where the state dental board refuses to apply, in satisfaction of a judgment, funds received and collected by it which are not public or state funds, the court has jurisdiction in supplemental proceedings to appoint a receiver to collect and apply the funds. *Stern v. State Board of Dental Examiners* 100

STATUTES:

See **FRAUDS**, **STATUTE OF**.

Establishment of branch banks, see **BANKS AND BANKING**, 1.

Fish laws, see **FISH**.

STATUTES—CONTINUED.

- Taxation for highways, see HIGHWAYS, 3.
- Action on domestic judgment, duration of lien, see JUDGMENT, 12.
- Amendment and correction of judgments; see JUDGMENT, 3.
- Statutes of limitation, see LIMITATION OF ACTIONS.
- Amendment of municipal charter, see MUNICIPAL CORPORATIONS, 1.
- Assessments for local improvements, implied repeal, see MUNICIPAL CORPORATIONS, 3.
- Pleading performance of conditions upon which action is based, see PLEADING, 1.
- Exemption from taxation, see TAXATION, 2, 3.

- 1. STATUTES—PARTIAL INVALIDITY—EFFECT. The unconstitutionality of Laws 1907, p. 69, § 1, in so far as it exempts moneys from taxation does not affect the constitutionality of its other provisions exempting credits. *State ex rel. Wolfe v. Parmenter*..... 164

- 2. STATUTES—TITLES AND SUBJECTS—SUFFICIENCY. As the title of an act need not be a complete index of its contents, and is sufficient if comprehensive enough to call attention to the subject-matter, the title to the direct primary law, Laws 1907, p. 457, being "an act relating to, regulating and providing for the nomination of candidates for public office in the state of Washington, and providing penalties for the violation thereof," is sufficient to include provisions relating to the filing of itemized statements of the candidate's expenditures, provisions for the nomination of candidates for Congress and the United States Senate, provisions relating to fees to be paid by the candidates, and provisions as to who shall be considered nominees and entitled to have their names appear on the ballots to be used at the general election, the selection of candidates for which was the sole purpose of the primary election; since they all legitimately relate to, regulate and provide for nominations of candidates for public office in the state of Washington. *State ex rel. Zent v. Nichols* 508

- 3. STATUTES—TITLE—REFERENCE TO SUBJECTS. The title to the anti-cigarette law, "to regulate and in certain cases prohibit" sales, does not violate the constitutional requirement that the subject shall be expressed in its title, even if the law is unconstitutional in part or contains prohibitive provisions only and the title takes a broader scope than its valid provisions actually cover; since the unconstitutionality of part of a statute does not render invalid other portions unless all are necessarily connected, and the title may properly refer to all its provisions. *State v. Winsor*..... 407

- 4. STATUTES—TITLES AND SUBJECTS—TAXATION. The title of an act "relating to revenue and taxation" is sufficiently broad to include provisions exempting certain property from taxation. *State ex rel. Wolfe v. Parmenter*..... 164

STATUTES—CONTINUED.

5. **SAME—AMENDMENTS—ERRONEOUS REFERENCE—EFFECT.** Where the title of an act is declared to be one amending a specified former law "relating to revenue and taxation," while the law referred to relates to mining claims, the reference to the law is to be taken as a clerical error and surplusage; and the act being a clear treatment of the subject of revenue and taxation, is valid without reference to the law amended, as an independent act amending existing statutes by implication. *State ex rel. Wolfe v. Parmenter*..... 164
6. **STATUTES—AMENDMENT BY REFERENCE TO TITLE.** The primary election law does not violate Const. art 11, § 37, which provides that no act shall ever be revised or amended by mere reference to its title but that the act must be set forth in full; since the constitution was not intended to prevent the enactment of statutes complete in themselves which repeal or amend existing statutes, without setting forth the repealed statutes. *State ex rel. Zent v. Nichols* 508
7. **SAME.** A reference to a former statute to the effect that in certain instances the same shall not be affected by the terms of the new law superseding and limiting former statutes on the subject, is not an amending or revising of an act by mere reference to its title, when the new law is a complete act within itself. *State ex rel. Zent v. Nichols* 508

STAY:

Effect of stay bond on right to appeal, see **APPEAL AND ERROR**, 5.
 Of action until costs of prior suit are paid, see **COSTS**, 4.

STREET RAILROADS:

Injuries to passengers on alighting from cars, see **CARRIERS**.
 Personal injuries from contact with electric wire, see **ELECTRICITY**.

1. **STREET RAILROADS—FRANCHISE—VALIDITY—MUNICIPAL CORPORATIONS—CITY COUNCIL—POWERS.** Laws 1903, p. 364, vests in the legislative authority of the city, i. e., its mayor and council; the power of granting street railway franchises, and a franchise is valid without submission of the same to a vote of the people. *Benton v. Seattle Electric Co.* 156
2. **SAME—AMENDMENTS TO CHARTER.** The amendment to the Seattle city charter, art. 4, § 20, which required an ordinance granting a street railway franchise to be submitted to a vote of the people, is void, since the legislature by Laws 1903, p. 364, vested in the legislative authority of the city the power of granting street railway franchises; hence an ordinance granting a franchise without the restrictions imposed by such amendment is valid. *Benton v. Seattle Electric Co.* 156
3. **STREET RAILWAYS—COLLISION WITH TEAM—PLEADING AND PROOF—VARIANCE—MATERIALITY.** In an action for damages to plaintiff's team, there is no material variance between a complaint alleging that the team was "struck, knocked down and run over by defend-

STREET RAILROADS—CONTINUED.

ant's cars," and proof that five or ten minutes after the team was knocked down by one street car, and while one horse was still down, it was struck by another car; as the second collision happened so soon after the other as to be part of the same transaction, and as the remedy of the defendant was by motion against the comprehensive language of the complaint, a variance being immaterial unless a party is misled to his prejudice. *South Tacoma Fuel & Transfer Co. v. Tacoma R. & Power Co.*..... 686

4. **STREET RAILWAYS—NEGLIGENCE—VIOLATION OF SPEED ORDINANCE—COLLISION WITH VEHICLE—INSTRUCTIONS.** An instruction to the effect that it would be negligence if a street car that collided with a vehicle was exceeding the speed limit in the business or settled district of a city, is not objectionable as authorizing a recovery regardless of the negligence of the plaintiff, when other instructions required that plaintiff be in the exercise of ordinary care. *Engelker v. Seattle Electric Co.*..... 196
5. **SAME—VIOLATION OF ORDINANCE AS NEGLIGENCE.** Violation of a city ordinance, by exceeding the speed limit in the business or settled district of a city, constitutes negligence. *Engelker v. Seattle Electric Co.* 196
6. **SAME—INSTRUCTIONS.** In an action for injuries sustained by the driver of a wagon in a collision with a street car, it is not prejudicial error in giving a requested instruction as to the plaintiff's contributory negligence, if the jury find that "the car was running at ordinary rate of speed" for the court to add "that is, not exceeding twelve miles an hour," which was the prescribed speed limit alleged to have been violated, when read in connection with other proper instructions as to the care to be exercised by the plaintiff. *Engelker v. Seattle Electric Co.*..... 196

STREETS:

See MUNICIPAL CORPORATIONS.

SUMMONS:

See PROCESS.

Presumptions as to due service of summons, see JUDGMENT, 6, 7.

In mandamus proceedings, see MANDAMUS, 2.

In tax foreclosure proceedings, see TAXATION, 9-11.

SUPERSEDEAS:

On appeal, amount of bond, see APPEAL AND ERROR, 20.

SUPPLEMENTAL RECORD:

See APPEAL AND ERROR, 26.

SUPPLEMENTARY PROCEEDINGS:

Enforcement of judgment against state dental board, see STATES, 4, 5.

SURPRISE:

Ground for continuance, see CONTINUANCE.

SURVEYORS:

Duty of commissioners to provide instruments for, see COUNTIES, 1.

SURVEYS:

Of fishing locations, see FISH.

TAXATION:

Tax deed as color of title, see ADVERSE POSSESSION, 3.

For highway purposes, see HIGHWAYS, 3.

Mandamus to compel listing of moneys and credits, see MANDAMUS, 3.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 3-11.

Removal of cloud by tax foreclosure proceedings, evidence of title, see QUIETING TITLE.

Objection to acts relating to, as containing more than one subject, see STATUTES, 4.

Partial invalidity of laws exempting money from, see STATUTES, 1.

1. **TAXATION—PROPERTY SUBJECT—CREDITS—MONEYS.** Mortgages, accounts, certificates of deposit, judgments, state, county and municipal bonds and warrants, may all be classed as "credits" in the listing of property for taxation, but "moneys" cannot be so classed. *State ex rel. Wolfe v. Parmenter*..... 164
2. **SAME—EXEMPTION OF CREDITS—EQUALITY.** "Credits" are not property within Const. art. 7, §§ 1 and 2, requiring all property to be taxed in proportion to its value by uniform laws, "provided that a deduction of debts from credits may be authorized," and Laws 1907, p. 69, § 1, exempting the same is valid; since the total actual value of all property in the state may be taxed once without the taxation of credits and the taxation of credits would constitute double taxation, and any method which reasonably comprehends the taxation of all property once and avoids double taxation is within the requirements of the constitution. *State ex rel. Wolfe v. Parmenter*..... 164
3. **SAME.** The proviso to Const. art. 7, § 2, that debts may be deducted from credits in the assessment of property for taxation does not recognize credits as property within the requirement of the section that all property be taxed; inasmuch as the main subject of the action is the requirement of uniform taxation, and credits cannot be assessed without double taxation. *State ex rel. Wolfe v. Parmenter* 164
4. **SAME—EXEMPTION OF MONEYS.** Laws 1907, p. 69, § 1, exempting "moneys" from taxation, violates the constitutional requirement that all property be taxed. *State ex rel. Wolfe v. Parmenter*..... 164

TAXATION—CONTINUED.

5. TAXATION—PAYMENT—EVIDENCE—SUFFICIENCY. Upon an issue as to whether plaintiff had deposited sufficient money to redeem delinquent tax certificates, the court properly found that he did not, where the testimony of his son, who was working in the treasurer's office and directed the application of \$1,600 deposited for that purpose, was that more than enough had been deposited and part of the deposit was returned, while the county treasurer and his deputies testified that the deposit was not sufficient and notice thereof had been given to the son, who was requested and refused to make a further deposit. *Cavanaugh v. Roberts*..... 265
6. TAXATION — ASSESSMENTS — EXCESSIVENESS — RELIEF FROM—MISTAKE. The courts will grant relief from an excessive assessment, and require repayment of the tax, where it appears that 12.22 acres was by mistake assessed as 22.22 acres at the same rate per acre as adjacent property, making the assessment \$13,000 in excess of what it would have been if the assessor had known the area; nor is it necessary to relief that appeal be made to the board of equalization where the mistake was not discovered until after payment of the tax. *Puget Realty Co. v. King County*..... 349
7. TAXATION — CERTIFICATE OF DELINQUENCY — TIME FOR ISSUANCE. Under Laws 1897, p. 183, § 98, which designated no particular time for the issuance of a certificate of delinquency to a county, a certificate on the taxes for 1895 could be issued on January 31, 1898. *Cavanaugh v. Roberts*..... 265
8. TAXATION—ENFORCEMENT—FORECLOSURE OF GENERAL DELINQUENCY CERTIFICATE—FILING CERTIFICATE—NECESSITY. The failure to file delinquent tax certificates with the clerk of the court, prior to the commencement of a general county tax foreclosure, as required by Laws 1901, p. 385, § 3, does not deprive the court of jurisdiction, as the same is a regulation which affects no substantial right constituting due process of law; and since the proceeding is not in every sense a special statutory proceeding that needs to have been strictly followed on collateral attack. *Miller v. Henderson*..... 200
9. TAXATION—PROCESS—SUMMONS FOR PUBLICATION — SUFFICIENCY—STATUTES—CHANGE IN LAW—PENDING PUBLICATION. A summons for publication in a tax foreclosure, requiring appearance within sixty days after service of the summons, complying with the law existing at the time of the service, is void where before the service was complete, a new law took effect, providing that the summons require appearance within sixty days after the date of the first publication of the summons; as the new law governs in matters of procedure. *Silverstone v. Totten*..... 447
10. TAXATION—FORECLOSURE BY COUNTY—SUMMONS—NAME OF OWNER. A tax foreclosure proceeding is a proceeding *in rem*, and it is immaterial what name or names of the owners are used in the summons. *Noble v. Aune*..... 73

TAXATION—CONTINUED.

11. **TAXATION — FORECLOSURE — NOTICE — SUFFICIENCY — NAME OF DECEASED OWNERS.** A tax foreclosure judgment is void where the notice in foreclosure did not give the name of the owner to whom the property was assessed on the tax rolls, who was dead, but was directed to two descendants who, also, were dead at the time; since it failed to state either the name of the person to whom the property was assessed or the name of the owners; it being sufficient to give notice in the name of the person to whom the property was assessed, whether alive or dead, and unnecessary to name the present owners. *Preston v. Cox*..... 451
12. **TAXATION—JUDGMENT—IRREGULARITY—EFFECT.** An irregularity in a tax foreclosure judgment foreclosing a lien against lot 23, in giving the number of the lot in a tabulated statement as lot 22, following the proper description, is a clerical error to be treated as surplusage that does not avoid the judgment. *Stevens v. Dooher*.. 145
13. **TAXATION—ENFORCEMENT OF TAXES—STATUTORY PROVISIONS—TAX DEED—BY WHOM EXECUTED—CITY TAXES.** Under the express provisions of Laws 1893, p. 167, which is prospective only, city taxes levied under prior laws must be collected and enforced in the manner provided by the city charter; and for taxes levied in Seattle in 1891, the tax deed must be executed by the city treasurer. *Silverstone v. Norton*..... 531

TENDER:

Of amount due as constituting cessation of controversy, see **APPEAL AND ERROR**, 7.

Of deed as condition precedent to action for cancellation of contract of sale, see **VENDOR AND PURCHASER**, 7.

Of purchase price for land under option agreement, see **VENDOR AND PURCHASER**, 2, 3.

THEORY OF THE CASE:

As determining scope and extent of review, see **APPEAL AND ERROR**, 27.

TICKETS:

Ejection of passengers offering invalid tickets, see **CARRIERS**, 4-6.

TIME:

For taking appeal or suing out writ of error, see **APPEAL AND ERROR**, 16-19.

For service of notice of appeal, see **APPEAL AND ERROR**, 24.

Review of discretionary action, see **APPEAL AND ERROR**, 33-37.

Stipulations as to time for performance of contract, see **CONTRACTS**, 3.

For removal of timber, construction of reservation in deed, see **DEEDS**.

For filing list of expenditures by candidates for nomination under primary law, see **ELECTIONS**, 1.

TIME—CONTINUED.

For presentation of claims against decedent's estates, see **EXECUTORS AND ADMINISTRATORS**, 4.

Filing informations, see **INDICTMENT AND INFORMATION**.

For issuance of certificate of delinquency, see **TAXATION**, 7.

As essence of option agreement, see **VENDOR AND PURCHASER**, 2, 3.

TITLE:

Color of title, see **ADVERSE POSSESSION**.

Estoppel by failure to assert title, see **ESTOPPEL**.

Removal of cloud, see **QUIETING TITLE**.

Of statutes, see **STATUTES**.

Defect as ground for rescission of sale of land, see **VENDOR AND PURCHASER**, 4, 5.

TORTS:

See **FRAUD; NEGLIGENCE**.

Damages, inadequate or excessive, see **DAMAGES**.

Causing death, see **DEATH**.

Injuries caused by defects or obstructions in road, see **HIGHWAYS**, 6-8.

Of cities, see **MUNICIPAL CORPORATIONS**.

Injuries to person at railroad crossing, see **RAILROADS**.

Injuries caused by operation of street cars, see **STREET RAILROADS**, 3-6.

Diversion of natural water courses, see **WATERS AND WATER COURSES**, 1, 2.

TRANSCRIPTS:

Of record for purpose of review, see **APPEAL AND ERROR**, 25, 26.

TRESPASS:

Ejection of trespasser, see **CARRIERS**, 4-6.

TRIAL:

Review of rulings as dependent upon objections or exceptions in lower court, see **APPEAL AND ERROR**, 8-14.

Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 42-51.

Instructions in action for injuries to passengers, see **CARRIERS**, 1, 2.

Continuance in civil actions, see **CONTINUANCE**.

In criminal prosecutions, see **CRIMINAL LAW**.

Condemnation proceedings, see **EMINENT DOMAIN**.

Competency of and challenge to jurors, see **JURY**.

Instructions in action for injuries to servant, see **MASTER AND SERVANT**, 22.

Examination of witnesses, in action for personal injuries, see **MUNICIPAL CORPORATIONS**, 16.

TRIAL—CONTINUED.

- Instructions in action for injuries sustained by collision with street car, see **STREET RAILROADS**, 4, 6.
- Instructions as to measure of damages for breach of contract, see **VENDOR AND PURCHASER**, 13.
- Responsiveness of answer and remarks by witness, see **WITNESSES**, 3.
- Attendance and examination of witnesses, see **WITNESSES**.
1. **TRIAL—RECEPTION OF EVIDENCE—SEPARATION OF WITNESSES—DISQUALIFICATION OF WITNESSES.** The disobedience of a witness to an order excluding witnesses from the courtroom does not disqualify him, and he should not be prevented from testifying except for a party's connivance in his disobedience. *Hendelman v. Kahan*.. 247
 2. **TRIAL—QUESTIONS FOR JURY.** The preponderance of conflicting evidence is a question for the jury. *Garretson v. Tacoma R. & Power Co.* 24
 3. **TRIAL—PROVINCE OF JURY—CREDIBILITY AND WEIGHT OF EVIDENCE.** It is the province of the jury to pass upon the credibility of the witnesses and the weight of the evidence. *Herbert v. Hillman*..... 83
 4. **TRIAL—MISCONDUCT OF JUDGE—COMMENT ON FACTS—INSTRUCTIONS.** In an action for money loaned, an instruction that the defendants admitted in their answer that the plaintiff loaned them the two sums of money claimed, is not an unlawful comment on the evidence when it was not an issue in the pleadings; and in any event the same would not confuse the jury where the defendants had the benefit before the jury of their contention that only part of it was received as a loan, and where under the evidence and the whole case the jury must have understood the instruction as meaning that defendants only admitted receiving the money. *Hendelman v. Kahan* 247
 5. **TRIAL—MISCONDUCT OF COURT—COMMENTS.** It is not unlawful comment on the evidence for the court, in directing the defendant to state his defense, to say that the nature of the case is such that the jury ought to know how defendant intended to meet the state's case. *State v. King*..... 312
 6. **TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE.** An instruction to the jury based upon the contingency that they find damages to timber "by the noxious vapors arising from its smelter" is not unlawful comment on the evidence, it having been shown that the vapors or gases were destructive, since they were therefore noxious, and it is immaterial that they were so termed. *Johanson v. Northport Smelting and Refining Co.*..... 567
 7. **TRIAL—INSTRUCTIONS—REQUESTS.** It is not error to refuse requested instructions that are covered in the general charge. *Engelker v. Seattle Electric Co.*..... 196

TRIAL—CONTINUED.

8. **TRIAL—RECEIVING VERDICT.** Error cannot be assigned on the action of the court in sending the jury back with the pleadings, to cure an oversight in not sending the same to the jury room, after the verdict had been read but before it was received or filed, where the jury presently returned with the same verdict, which was received and filed. *Matthews v. Spokane*..... 107
9. **TRIAL—VERDICT—SPECIAL VERDICT.** An answer to a special interrogatory, to the effect that plaintiff had not "walked around" a manhole three or four times and did not know of its location, is proper where it simply appeared that she had passed by and knew of its general location, and the same is not inconsistent with a general verdict for plaintiff. *Perry v. Centralia*..... 670
10. **TRIAL—SPECIAL FINDINGS—CONSISTENCY—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OPERATION OF TRAINS.** In an action by a conductor for injuries sustained in a rear end collision, a special finding of the jury that his train was delayed in the run from W. to R. under circumstances which should have caused him to apprehend that it might have been overtaken by another train, is inconsistent with a special finding that the speed of the train was not so reduced running up grade from S. to K. as to endanger his train and the circumstances were not such "during any part of this run between such points" as should have caused him to take certain precautions, the same being prescribed by the rules of the company under the circumstances found by the first special finding; and a general verdict inconsistent with the first finding will not be sustained when contrary to the undisputed testimony as to the conductor's negligence in not observing the precautionary rules. *Boucher v. Oregon R. & Nav. Co.*..... 627

TROVER AND CONVERSION:

Seizure of mortgaged property by sheriff, see **CHATTEL MORTGAGES**, 3.

TRUSTEES:

Right of trustee in bankruptcy to costs as against estate of insolvent, see **COSTS**, 2.

UNITED STATES:

Exemption of proceeds of sale of Federal homestead, see **EXECUTION**.

VACANCIES:

Declaration of candidacy for office of judge under primary election law, failure to specify term, see **ELECTIONS**, 6.

VACATION:

Of garnishment, see **GARNISHMENT**.
Of judgment for fraud, see **PROCESS**.

VALUE:

Limits of jurisdiction, see **APPEAL AND ERROR**, 1-3.

As evidence of contract price for land sold, see **VENDOR AND PURCHASER**, 10, 11.

VARIANCE:

In pleading, see **PLEADING**, 5.

Pleading in action for damages to team by street car, see **STREET RAILROADS**, 3.

VENDOR AND PURCHASER:

Authority of broker to make binding contract of sale, see **BROKERS**, 2.

Right of vendor in conditional sale to limit power of making other contracts respecting payments, see **CONTRACTS**, 1.

Right to exemption of proceeds of Federal homestead, see **EXECUTION**.
Purchasers of property fraudulently conveyed, see **FRAUDULENT CONVEYANCES**.

Judgment of foreclosure as notice to subsequent purchasers from mortgagor, see **MORTGAGES**, 5.

Fraud of agent in inducing contract of sale, see **PRINCIPAL AND AGENT**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**.

Transfers of ownership of personal property, see **SALES**.

1. **VENDOR AND PURCHASER—UNAUTHORIZED CONTRACT—RATIFICATION—PRINCIPAL AND AGENT.** A contract to sell real estate, made subject to the owner's approval and entered into by a broker without authority, is not ratified by the owner by an acceptance of an offer for the property which specified the same price, but failed to specify material terms of the contract of which the owner had no knowledge. *Hardinger v. Columbia*..... 405
2. **VENDOR AND PURCHASER—CONTRACTS—OPTIONS—ACCEPTANCE—FAILURE TO EXERCISE OPTION.** An option agreement for a railroad right of way, whereby the owners agree to convey the right of way within six months upon payment of \$900, and wherein it is stipulated that if the company fail to exercise the option within the time specified the agreement shall be null and void, is not changed into a contract binding upon both parties, in which time would not be of the essence, by a written letter of acceptance stating that the payment agreed upon would be made; but time is of the essence, and if tender is not made within the time fixed the contract is at an end. *Spokane, Portland & Seattle R. Co. v. Ballinger*..... 547
3. **SAME—PERFORMANCE—WAIVER—ESTOPPEL.** The fact that the vendors in an option agreement for a railroad right of way allowed the company to go on the premises and make improvements during the period of the option, does not estop them from insisting upon a strict performance of the agreement, and in refusing to make a conveyance where tender of the price was not made within the time specified. *Spokane, Portland & Seattle R. Co. v. Ballinger*..... 547

VENDOR AND PURCHASER—CONTINUED.

4. VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—TITLE OF VENDOR—OBJECTIONS. It is not a valid objection to title, placing the vendor in default, that the given name "Hannah" in the chain of title was spelled with one "n" in one deed and with two in the other deed, and that as grantee her residence was given as P. county, Washington Territory, in 1870, and as grantor, B. county, Oregon, in 1880. *Kane v. Borthwick*..... 8
5. SAME. It is not a valid objection to a title that the husband of the grantor who executed the deed was not named as one of the grantors, where he was named in the body of the warranty clause and covenanted that the wife was seized in fee simple. *Kane v. Borthwick* 8
6. VENDOR AND PURCHASER—CONTRACT TO CONVEY—PERFORMANCE—WAIVER OF TIME LIMIT—SPECIFIC PERFORMANCE. There is a waiver of the thirty-day time limit for perfecting title to land agreed to be sold, rendering the contract binding on the vendor and subject to specific performance, where it appears that a corrective deed was required from an eastern party, which the vendor wrote for, and upon answer being received that the party was dead but that steps would be taken to secure a correction through court proceedings, the vendor acquiesced in the statement of her agent that the only thing to do was "to wait until the deed comes," which could not be within the thirty days; that correspondence was had with reference to securing the deed, and no return of earnest money paid to the vendor was tendered to the vendee for sixty days, who refused to receive it, or accept a part only of the land; and the vendee tendered the full price as soon as she learned of the arrival of the corrective deed. *Secombe v. Fuller*..... 666
7. VENDOR AND PURCHASER—REMEDIES OF VENDOR—TENDER—WAIVER—QUIETING TITLE—CANCELLATION OF INSTRUMENTS. A tender of a deed is not a condition precedent to an action by vendors for the cancellation of a contract of sale as a cloud on title, where the vendees refused to accept the title, and the vendors were able and willing to perform the contract. *Kane v. Borthwick*..... 8
8. SAME—DEFENSES—ESTOPPEL. In an action to recover the purchase price of lands sold and conveyed, the fact that plaintiff had retained certain bonus notes and sums collected for the benefit of the defendants, does not amount to an estoppel to prosecute the action, but at most a counterclaim or independent demand. *Warwick v. Hitchings* 140
9. VENDOR AND PURCHASER—ACTION FOR PRICE—PLEADING—MATTERS TO BE PROVED—PARTNERSHIP. In an action against two defendants for the purchase price of land sold and conveyed, the allegation that they were copartners is immaterial, as their liability as joint purchasers would be the same as that of partners. *Warwick v. Hitchings* 140

VENDOR AND PURCHASER—CONTINUED.

10. VENDOR AND PURCHASER—CONTRACT—CONSIDERATION—EVIDENCE. In an action for the purchase price of land sold and conveyed, upon an issue as to whether the contract price was \$1,100 or \$100, evidence of its market value at the time of the sale is admissible, as bearing on the probabilities. *Warwick v. Hitchings*..... 140
11. SAME. In an action for the purchase price of land sold and conveyed, upon an issue as to whether the price was \$1,100 or \$100, evidence is admissible that the citizens of the place had, at the time of the sale, subscribed \$1,000 to aid in the purchase of the property or in the construction of a sawmill thereon by the defendants, as supporting plaintiff's claim if the same was for the purchase of the land, or as a circumstance in favor of defendants if the subscription was in their aid. *Warwick v. Hitchings*..... 140
12. VENDORS—BREACH OF CONTRACT—ACTIONS—TIME FOR COMMENCEMENT. Where a party has put it out of its power to perform a contract relating to the sale of property, by selling the same, the second party may recover damages for the breach without waiting until the time of the expiration of the contract. *Huster v. Wenatchee Land Co.* 438
13. VENDOR AND PURCHASER—CONTRACT FOR SALE—BREACH BY VENDOR—MEASURE OF DAMAGES—INSTRUCTIONS. The measure of damages for the breach of a contract to convey land, where the vendor subsequently sold the same to another, is the amount paid by plaintiff and the increase in value above the purchase price at the time of the breach; and an instruction fixing the damages at the difference between the amount agreed to be paid and the market value at the time of the breach, less the unpaid amount due on the price, is error, requiring a new trial, even if disregarded by the jury. *Herbert v. Hillman*..... 83

VENUE:

Criminal prosecutions, see CRIMINAL LAW, 1.

VERDICT:

Review on appeal or writ of error, see APPEAL AND ERROR, 38-41.

Damages for injury to property through condemnation, see EMINENT DOMAIN, 5.

In civil actions, see TRIAL, 8-10.

VERIFICATION:

Of claims against municipality, see MUNICIPAL CORPORATIONS, 19.

VICE PRINCIPALS:

See MASTER AND SERVANT, 6, 8, 20.

VOTES:

- Percentage of votes for nomination of candidate, first and second choice votes, see **ELECTIONS**, 9, 10.
- Submission of question of granting street railway franchise, see **STREET RAILROADS**, 1, 2.

WAIVER:

- Of right to appeal, see **APPEAL AND ERROR**, 4.
- Of error, see **APPEAL AND ERROR**, 27, 30.
- Defects or objections to indictment and information, see **INDICTMENT AND INFORMATION**.
- Of forfeiture for nonpayment of premium, see **INSURANCE**, 2.
- By vendee of right to performance of contract, see **SPECIFIC PERFORMANCE**.
- Of time limit for perfecting title to land, see **VENDOR AND PURCHASER**, 6.
- Of conditions of option agreement, see **VENDOR AND PURCHASER**, 2, 3.

WARDS:

- See **GUARDIAN AND WARD**.

WARNING:

- Duty of master to give, see **MASTER AND SERVANT**, 4, 8, 10, 12.

WARRANTY:

- On sale of horse, see **SALES**.

WATERS AND WATER COURSES:

1. **WATERS AND WATER COURSES — ARTESIAN WELLS — DIVERSION — GRANTS OF WATER RIGHTS.** The rule that an action does not lie for intercepting or diverting subterranean waters does not apply where the predecessors in interest had defined their rights by a deed conveying a specified flow of a portion of the water from an artesian well to be used for irrigating purposes; and injunction lies to prevent diversion of the amount agreed by deed to be delivered. *Charon v. Clark* 191
2. **SAME—PRIORITIES.** Where several grants are made to portions of the water from an artesian well, the first grantee, who received a specific amount, takes a definite estate therein, and subsequent grantees with notice hold subject thereto. *Charon v. Clark*.... 191
3. **WATERS — WATER COMPANIES—FLOODING — DAMAGES — EVIDENCE—SUFFICIENCY.** Evidence that a small cottage on a hillside lot was damaged by the negligent maintenance of a water pipe line, and that a portion of the land was carried away, sustains a verdict for the plaintiffs for \$500; the amount being for the jury, they having viewed the premises. *French v. West Seattle Light & Water Co.* 257

WITNESSES:

Review of rulings involving discretion of court, see **APPEAL AND ERROR**, 34.

Instructions as to credibility, see **CRIMINAL LAW**, 5.

Cross-examination to show interest of witness, see **MUNICIPAL CORPORATIONS**, 16.

Separation and exclusion of witnesses in civil causes, see **TRIAL**, 1.

1. **WITNESSES—TRANSACTION WITH DECEASED.** The son of one of the parties is not incompetent to testify as to conversations had with the deceased, since a prospective heir is not a party in interest. *In re Sloan's Estate* 86
2. **WITNESSES—COMPETENCY—TRANSACTION WITH DECEASED.** In an action to enjoin the removal of timber sold by plaintiff to one M., who sold the same to defendants, brought after the death of M., the plaintiff is incompetent to testify to the transaction between himself and M. upon an issue as to the terms of the contract, under Bal. Code, § 5991, prohibiting testimony by a party in interest as to transactions had with a deceased person. *Preston v. Hill-Wilson Shingle Co.* 377
3. **WITNESSES—RESPONSIVENESS.** Where plaintiff was asked to state what was the fact as to there being timber on land, claimed to have been damaged by fumes from a smelter, an answer that "it is all timber" need not be struck out as not responsive to the question, especially where the court directed further answer to the question. *Johnson v. Northport Smelting and Refining Co.* 567
4. **WITNESSES—CREDIBILITY—EVIDENCE OF ANIMOSITY.** In a prosecution for forgery of an order for witness fees, it is proper to exclude cross-examination of state's witness to show her animosity to the accused by evidence that she was a friend of a party unsuccessfully defended by the accused. *State v. Gilluly* 1

WOODS AND FORESTS:

Reservation of standing timber, construction of deed, see **DEEDS**.

WORK AND LABOR:

Liability of estate for service rendered to decedent, see **EXECUTORS AND ADMINISTRATORS**, 2, 3.

Liens for services in getting out logs, see **LOGS AND LOGGING**.

Liens for work and materials, see **MECHANICS' LIENS**.

1. **WORK AND LABOR—SERVICES IN FAMILY RELATION—AGREEMENT TO PAY—EVIDENCE—SUFFICIENCY.** It is not necessary to prove the terms of a direct and positive contract for services performed between parties sustaining a family relationship, and there is sufficient evidence of an agreement to pay for services to sustain a verdict for the plaintiff, where it appears that the plaintiff had lived with the defendant as a child, attending school, but left his family, and thereafter the defendant approached the plaintiff's father offering to com-

WORK AND LABOR—CONTINUED.

plete her education, make her a beneficiary in a life insurance policy and a general heir of his estate, besides boarding and clothing her, if she would return and work for him as housekeeper, bookkeeper, and nurse, that defendant was referred to plaintiff, who had attained majority, who did return and faithfully performed the services mentioned, taking up all her time for five years, without other compensation than that mentioned, that defendant made her a beneficiary in the insurance policy for a time, and that at the end of five years she left him to be married, with his consent. *Pelton v. Smith*..... 459

WRITINGS:

Effect of reducing contract to writing after commencement of work,
see **CONTRACTS**, 2.

WRITS:

See **MANDAMUS**; **PROCESS**; **PROHIBITION**; **REPLEVIN**.



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